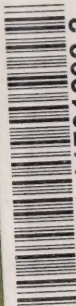


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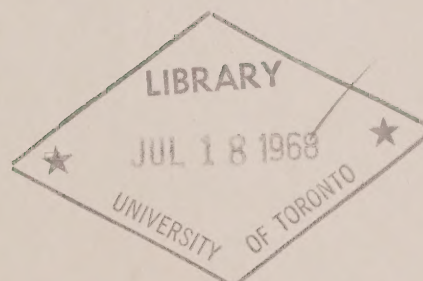
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REPORT
OF
THE COMMITTEE TO SURVEY THE
WORK AND ORGANIZATION OF THE
CANADIAN PENSION COMMISSION
VOLUME III





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VOLUME III

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REPORT OF THE COMMITTEE TO
SURVEY THE ORGANIZATION AND WORK OF
THE CANADIAN PENSION COMMISSION

PART FOUR
MISCELLANEOUS AREAS

CHAPTER 22SECTION I - TITLEGENERAL

Section 1 of the Pension Act reads as follows:

1. This Act may be cited as the Pension Act.

REPRESENTATIONS AND EVIDENCE

Several veterans organizations proposed that the term "war disability compensation" be substituted for the word "pension". Their recommendation was made on the premise that the word "pension" or "pensioner" implies a connotation of a dependant or one in receipt of an income as an act of grace.

The organizations suggested also that, with the inauguration of the Canada Pension Plan confusion would exist between compensation for a disability incurred during war service and the contributory type of pension payable under this Plan.

COMMITTEE RECOMMENDATION

(98) That there be no change in the wording of Section 1.

Pension Act

COMMENT

Although the term compensation might fit the circumstances of those serving in the Armed Forces in peacetime, the term "war" would be unsuited to awards made for claims arising from peacetime service.

On the other hand the status of the war veteran is such that, in your Committee's view, the term "disability compensation" does not adequately and accurately describe his circumstances.

Your Committee is aware that inaccurate inferences may be drawn from the word "pension". However, the dictionary meaning relates it to a reward for merit, as well as to assistance based on financial need.

The term "war disability compensation" is somewhat lengthy and does not commend itself to your Committee. Moreover, the point was not pressed strongly by any veterans group. In the absence of further suggestions, and in face of the demands on your Committee's time by many other matters which those appearing regarded as being of a pressing nature, your Committee is not prepared to make any recommendation for change.

Your Committee is aware that there are other forms of "pension" under jurisdiction of the Canadian Government. It appears significant, however, that the original provision for pension under Canadian legislation was that provided in the Pension Act of 1919, as a provision for those who served in World War I, and their dependants.

If change is needed because of confusion with other statutes, it could best be resolved after consultation with those responsible for administration of the other statutes.

Representations and Evidence

Chief of the Defence Staff: A further extract is made from the submission by the Defence Staff dated February 10, 1966 as follows:³

In so far as we have been able to ascertain, there have been no regulations made pursuant to the Pension Act. Further, there would appear to be no consolidated Pension Board policy directives, and/or opinions.

Similar complaints were made in other representations heard by your Committee. There seemed to be little general knowledge outside of the Pension Commission regarding its written directives.

It is significant that some witnesses reported, through sources they regarded as confidential, that they had become aware of the existence of directives which had apparently been issued by the Pension Commission for the guidance of its staff. Some examples are:

- (1) The War Amputations of Canada filed with the Committee a copy of what appeared to be a Commission Directive based on the Commission's Routine Instruction 66 of January 25, 1938, as amended by the Commission up to March 25. This was unsigned and undated.
- (2) The Hong Kong Veterans Association filed with the Committee a copy of Routine Instruction No. 65 dated January 6th, 1938 dealing with assessments for pension for tuberculosis.

Your Committee had brought to its attention, from various sources, other Pension Commission directives. It did appear, however, that the Veterans' Bureau of the Department of Veterans Affairs, the Legal Services personnel of the Department of National Defence, and veterans organizations, were not in possession of a complete record of policy directives, the lack of which seriously hampered their work in furthering applications for pension on behalf of veterans, service personnel or their dependants.

Representations and Evidence

Canadian Pension Commission: In his appearance before your Committee under date of March 25, 1966, Mr. T.D. Anderson, Commission Chairman, referred to what he termed "directives" of the Commission which were issued to Commission staff and, on an occasional basis, to veterans' organizations and others outside the Commission.

He explained that these directives dealt with procedure and went on to say:⁴

Yes, and they would not cover what is requested in a number of these briefs, I think perhaps I made a point the other day, when we were discussing this question of confining our interpretations to certain sections of the Act, how impossible this would be with these particular sections, and more than that, it would have the effect of restricting the Commission in the broad discretion which the Act deliberately gives them. I think my point is this that it is not our prerogative to confine legislation which parliament thinks should be left broad and general discretion.

COMMITTEE RECOMMENDATIONS

- (99) That Section 8 of the Pension Act be retained. Regulations
- (100) That the Commission publish Medical Advisory Branch Directives setting out policy with respect to the operation of the Branch. These would include: Medical
Advisory
Branch
Directives
- (a) The existing Table of Disabilities issued in the form of one or more of such Medical Advisory Branch Directives.
 - (b) Full information with respect to the basis upon which Attendance Allowance, Clothing Allowance, and other supplementary benefits are paid.
 - (c) Policies with respect to the application of medical opinion in regard to entitlement claims, where feasible. These Medical Advisory Branch Directives, numbered and indexed for ready reference, should be issued to District Offices of the Commission, Veterans' Bureau, Department of National Defence and veterans organizations and should be available to applicant and others acting on their behalf.
- (101) That the Commission publish Pension Law Directives, setting out Commission policy in respect of adjudication on pension claims. These should be issued for each basic area into which pension claims can be divided. The existing policy statements and directives should be re-written and included in them. Unwritten policies which have been followed by the Commission should be set out in these, where feasible, and when new policies are adopted these should be issued in the form of such Directives, as required. Pension
Law
Directives
- There should be a system of numbering and indexing for ready reference and distribution and availability should be on the same scale as that recommended for the Medical Advisory Branch Directives.
- (102) That the Commission issue Supplementary Benefit Directives, setting out the policy under which benefits under the Act, other than basic pension entitlement, may be granted, including dependent parents, re-married widows, unpaid balances, administration of pension, division of pension, last illness and burial grants, compassionate awards, and retroactive awards. Such Supplementary Benefit Directives should be made available and distributed on a basis similar to Medical Advisory Branch Directives. Like the others, they should be numbered and indexed. Supple-
mentary
Benefit
Directives
- (103) That the Commission issue Administrative Instructions governing its general administration. These instructions should be numbered and indexed but ordinarily would not be distributed outside of the Commission. Adminis-
trative
Instruc-
tions

Comment

The Pension Commission has made no use of Section 8, in that it has not made regulations in respect of the procedure to be followed in matters coming before the Commission.

The complaints heard by your Committee concerning the lack of published directives did not refer specifically to the type of regulations as envisaged in Section 8 of the Act, and your Committee noted little direct objection regarding the lack of knowledge in respect of procedures. The time may come, however, when the Pension Commission will decide to make use of this Section to define these procedures. In the meantime, the Section should be left available to the Commission.

The chief criticism in this area, by those appearing before your Committee, concerned the policy of the Pension Commission which resulted in an irregular distribution outside of the Commission of its directives and instructions. Alternatively, in regard to some critical aspects of pension policy, the Commission did not issue written instructions at all.

Your Committee found that the Commission has issued some directives and instructions. These were not the type of "regulation" envisaged under Section 8 of the Act, and did not require approval of the Governor-in-Council or promulgation through the Canada Gazette. It was the view of your Committee that this type of informal directive should be expanded, and sets of instructions distributed in an orderly manner.

In the recommendations set out above your Committee has suggested Medical Advisory Branch Directives, Pension Law Directives, and Supplementary Benefit Directives. These are suggested divisions only.

Comment

It is appreciated that every directive or instruction will not warrant the same distribution. While there are some suggestions for distribution in the recommendations, the basic requirement is that not only the Commission and those working with it have all necessary information readily available, but that applicants for pension and those assisting them have it also. Your Committee does not see why anything that will bear upon the result of an application for pension should be withheld from the applicant in the normal course of events. Certainly, all resolutions of the Commission, statements of policy, and approaches to interpretation should be made known to those whose interests are affected thereby. It is difficult to spell out all the requirements of this situation, and difficult to legislate it into effect. Extending the right will not do it. The answer lies in the administration of the Commission itself, and can best be worked out there.

Your Committee reviewed the Report prepared by the Methods and Inspection Division of the Department of Veterans Affairs in August, 1960 under the title "Project No. 16", dealing with administrative procedures. This report recommended the institution, by the Commission of a Standard Procedure Manual to describe the procedures required to carry out the work of the Commission. This Report cited four advantages of the manual as follows:

First, the preparation of such a manual has, in itself a salutary effect. The scrutiny which each operation receives in the process of writing a procedure is important for it usually discloses improvements and shortcuts which can be incorporated in instructions.

Second, the increased standardization should not only promote economy in office operations but should also ensure a standard of service consistent both within itself and with Commission policy. Consistency in the way policy is applied by clerical workers is much more easily achieved by written and formal instructions than by word-of-mouth instructions issued as individual problems arise.

Comment

Third, the training of new employees will be facilitated in that much more self-teaching will be possible with a manual and less time-consuming and expensive individual coaching by supervisors. As nearly as possible, instruction should be written in such a manner that any intelligent person (with the necessary basic qualifications) can carry through a job with little or no personal instruction.

Fourth, a procedures manual will permit all CPC employees to broaden their knowledge of the Commission's work. They will be able to study and trace any system or procedure beyond its application solely to the sections in which they work. This will help break down the insularity that impedes the transfer of employees from section to section as promotion opportunities present themselves.

Your Committee determined that the Commission had accepted the recommendation to prepare what it termed "standard practice instructions". However, apart from engaging a staff assistant for this purpose, no progress had been made on the project at the date of your Committee's enquiry into this aspect of the work of the Commission, i.e. January 12th, 1966.

Your Committee's recommendation that the Commission issue Administrative Instructions is in line with the recommendation made by the Methods and Inspection Division in its report of August, 1960.

REGULATIONSREFERENCES

1. Proceedings of Committee Sessions, Volume III, page L-87
2. Ibid, Volume IV, page N-48
3. Proceedings, Special Committee on Veterans Affairs, 1946, page 489
4. Proceedings of Committee Sessions, Volume V, page AA-19

CHAPTER 24

CLOTHING ALLOWANCEGENERAL

Clothing Allowances are provided under Section 30(2) and (3) of the Pension Act as follows:

A member of the forces in receipt of pension on account of an amputation of the leg at or above a Symes' amputation is entitled to an allowance on account of wear and tear of clothing of one hundred and eight dollars per annum; and a member of the forces in receipt of pension on account of an amputation at or above the wrist is entitled to an allowance on account of wear and tear of clothing of forty-eight dollars per annum.

A member of the forces in receipt of pension for any other disability for the relief of which any appliance must be worn or treatment applied that causes wear and tear of clothing may, in the discretion of the Commission, be granted an allowance in respect of such wear and tear not exceeding one hundred and eight dollars per annum.

REPRESENTATIONS AND EVIDENCE

Some veterans organizations made representations to your Committee on two matters affecting clothing allowance as follows:

- (1) The amount of the allowance
- (2) Extension of the allowance to certain categories of the disabled

War Amputations of Canada: The prepared brief expressed the view that these allowances were inadequate and suggested that the extra wear and tear on a suit of clothes for a leg or arm amputation was at least \$200 per annum, whereas the Act provided balances of \$108 per annum for a leg amputation and \$48 per annum for an arm amputation.

This Association made a further recommendation as follows: 1

Clothing Allowance: The Pension Act, Section 30(2) provides that amputation cases are entitled to clothing allowance on account of wear and tear of clothing as follows:

Leg Amputee	-	\$108	per annum
Arm Amputee	-	\$ 48	per annum

REPRESENTATIONS AND EVIDENCE

The Pension Commission, in setting out the Table of Disabilities has interpreted this Section to mean that the maximum annual clothing allowance which can be paid to an amputee is \$108 despite the fact that he may have undergone amputation of more than one limb.

Section 30(2) does not appear to make any such limitation and states only that a member is entitled to an annual allowance for amputation of a leg at \$108 and of an arm at \$48. The restriction is found in the Table of Disabilities, page 23, which states: "The maximum which may be paid is \$108 per annum". There does not appear to be any logical basis for this restriction. If a veteran has undergone amputation of an arm and a leg, he is being compensated for the leg, which provides the greater of the two allowances.

Recommendation: The Act states that this allowance is to compensate for wear and tear on clothing. The amount provided for wear and tear for a leg amputation is \$108 per annum which presumably includes damage not only to pants, but also to shoes, socks, etc. The allowance for an arm amputee is \$48 per annum which presumably makes provision for damage to suit coat, sport jacket, shirts, etc. It would seem appropriate, that a multiple amputee would be entitled to the maximum of clothing allowance for each amputated limb.

Royal Canadian Legion: A prepared brief recommended as follows: 2

It is recommended that this section be amended to include pensioners suffering from conditions which render it impossible to wear ready-made garments. We are particularly concerned about tubercular veterans who have undergone corrective surgery (thoracoplasty of seven ribs or more) to stop the advance of the disease. This procedure was frequently used in the 1940-50's. Many of these operative cases have to purchase tailor-made clothing in order that they may be presentable in public. Some of these pensioners have spinal curvature and/or other deformities made necessary to permit them to a maximum collapse of the affected lung. In such cases, depression caused by the removal of the rib under the arm makes it almost impossible for the pensioner to wear a proper fitting ready-made suit or sports jacket. We submit with our presentation photographs to illustrate these deformities.

We submit that in this instance it isn't a case of wearing a brace causing wear and tear, but it is part of the treatment that the man has received. The result is the same in that it costs the pensioner more money to clothe himself than it would if he did not have the disability.

REPRESENTATIONS AND EVIDENCE

We have suggested that it may be that the Commission can, by interpretation, grant this clothing allowance. If, however, on careful examination it is found that the legislation does not permit it, even by the widest interpretation, we would recommend that consideration be given to amending the legislation so that these people can receive some benefit from this clothing allowance provision.

HISTORY

The Royal Commission on Pensions and Re-Establishment, 1923-24 ,
referred in its report to the matter of wear and tear caused by
artificial appliances. The following reference was made: 3

Another factor urged as not being fairly provided for is the additional wear and tear of clothing caused by artificial appliances. Nowhere has the Commission been able to find any satisfying evidence that this feature was considered in preparing the Table of Disabilities. In Great Britain a special allowance for clothing is made on application in individual cases where actual loss on that account is shown. A letter from the Pensions Board dated February 13, 1920, to the Secretary, Amputation Club of Vancouver, was put in evidence, one paragraph of which was:

In the matter of wearing apparel there appears to be very fair cause for further consideration in all cases where pensioners must of necessity be burdened with an orthopaedic appliance. It is felt that this matter should be dealt with along lines similar to the supply of surgical boots and appliances.. Your Communication is, therefore, being passed to the Department of Soldiers' Civil Re-establishment for consideration.

A letter from a Toronto surgeon was put in at Winnipeg (706) which cast some doubt on the probability of there being any serious loss on account of wear of clothing, but, without referring in detail to the evidence, the Commission is convinced that the claim has merits and is one of the matters which calls for reconsideration of the Table of Disabilities.

HISTORY

This matter was discussed by the Special Committee on Pensions, Insurance and Re-establishment, 1924. Mr. Stewart Hobbs, representing the War Amputations Association, gave evidence before the Committee, as follows: ⁴

1924

We sent out a circular to every amputation case asking him to state what, in his opinion, would be the extra cost of the wear and tear on clothing. I happen to be the President of the Toronto Branch, and we got replies from some 400 men there. The average of the replies, throwing out the extravagant ones, and averaging up the reasonable, worked out to somewhere between \$55 and \$60 a year for leg amputations, and to about \$22 to \$24 a year for an arm amputation, who wears the arm.

The Parliamentary Committee, in its recommendation of July 10, 1924, adopted the recommendation of the Ralston Commission to the effect that the Table of Disabilities be amended to provide a special allowance for clothing

This recommendation was incorporated into the Pension Act in 1925 as Section 27 (3) as follows: ⁶

1925

A member of the Forces in receipt of pension on account of an amputation of the leg above a Symes' amputation shall be entitled to an allowance on account of wear and tear of clothing of fifty-four dollars per annum; and a member of the Forces in receipt of pension on account of an amputation at or above the wrist shall be entitled to an allowance on account of wear and tear of clothing of twenty-two dollars per annum.

The provision for clothing allowance was extended in 1928 by addition of the following: ⁷

1928

26(4) A member of the Forces in receipt of pension for any other disability for the relief of which any appliance must be worn or treatment applied which causes wear and tear of clothing may, in the discretion of the Commission, be granted an allowance in respect of such wear and tear not exceeding \$54 per annum.

HISTORY

The annotation explaining this stated:⁸

The proposed amendment extending the discretion of the Commission to make grants in any case in which there may be special wear and tear by reason of treatment.

There have been no changes for the provisions for clothing allowance under the Act since the amendment of 1928, except for increases in the amounts, approved from time to time.

COMMITTEE RECOMMENDATIONS

- (104) That Section 30(2) of the Act be amended to provide that a bi-lateral amputee receive clothing allowance at the maximum rate for one amputation plus one half of the maximum rate for his second amputation.
- (105) That Section 30(3) of the Act be amended to provide that where, because of a pensionable disability, a pensioner must wear specially-tailored garments, an allowance be granted in respect of the additional expense involved.

Clothing
Allowance
for
Bi-lateral
Amputee

Clothing
Allowance
for
Special
Garments

COMMENTGeneral

Parliament has accepted the principle since 1925 of providing special allowance for wear and tear of clothing. This, in the view of your Committee, was partly in recognition of the fact that pension itself was intended to replace earning power lost by the pensioner due to his disability, and that additional costs attributable to the disability, including clothing, should be provided for the pensioner.

Bi-lateral Amputees

Section 30(2) of the Pension Act, as written, is not clear. It states that an allowance of \$108 per annum will be paid "on account of an amputation of the leg" or \$48 per annum "on account of an amputation at or above the wrist". The Pension Commission has interpreted this to mean that, where a pensioner has a bi-lateral amputation (both legs) he is entitled to the allowance of \$108 only. Your Committee presumes this interpretation to be based on the assumption that the amputation of a second leg would not cause more wear and tear than that of the single leg.

An artificial leg causes footwear to become misshapen and is responsible for excessive scuffing of the toe cap of a shoe. It results also in more than the usual amount of holes in stockings and in trouser legs. Your Committee considers that, in general terms, the wear and tear caused by an upper-limb prosthesis is particularly noticeable in shirts, sweaters, suit coats and overcoats. This wear and tear will normally develop at the wrist, forearm or elbow.

Your Committee accepts the view that a double-leg or a double-arm amputee would not experience twice the wear and tear of a single arm or leg amputee. He would, however, find that the chaffing and fraying of his clothing

COMMENTGeneral

from two lower or two upper prosthesis would be more in extent than for a single prosthesis. Accordingly, your Committee has seen fit to recommend that, for a bi-lateral amputee (arm or leg), the allowance should be increased by one half the maximum rate paid for a single amputation.

Special Garments

The Pension Act, as written, is specific in stating that clothing allowance can be paid only for wear and tear of clothing. Your Committee suggests that the principle should not necessarily be restricted to wear and tear, but should take into account also any pensionable condition which causes additional expense for the pensioner. In other words, the basic pension is based on the degree of his disqualification in the unskilled labour market. If he has extra expense by reason of the need to purchase special clothing, an additional allowance in this respect would be fully justified. Accordingly, your Committee has suggested that Section 30(3) of the Act be expanded to provide clothing allowance not only where there is wear and tear arising out of use of an appliance or because of treatment, but also to meet the needs for specially-tailored garments, where such exists.

CLOTHING ALLOWANCEREFERENCES

1. Proceedings of Committee Sessions, Volume II, page K-12
2. Ibid, Volume III, page L-151
3. Report, Royal Commission on Pensions and Re-establishment 1923-24, Sessional Paper 203, page 46
4. Minutes, Special Committee on Pensions, Insurance and Re-establishment 1924, Appendix 6, page 14.
5. Ibid, page 26
6. SC 1925, C.49, assented to June 27th, 1925
7. SC 1928, C.38 s. 17, assented to June 11th, 1928
8. Bill 289, as passed by the House of Commons, May 18th, 1928.

CHAPTER 25
PENSION FOR WIDOW ON
DEATH OF A PENSIONER

GENERAL

Section 36(3) of the Pension Act provides as follows:

- 36(3) Except as otherwise provided in this Act, the widow of a member of the forces who was, at the time of his death, in receipt of a pension in any of the classes one to eleven, inclusive, mentioned in Schedule A, or who died while on the strength of the Department for treatment and, but for his death, would have been in receipt of pension at the rate so provided for any of those classes, is entitled to a pension as if the member had died on service whether his death was attributable to his service or not, if
- (a) she was married to him before he was granted of such pension, and
 - (b) her marriage to him took place after the grant of such pension, and
 - (i) his death occurred one year or more after the date of the marriage, or
 - (ii) his death occurred less than one year after the date of the marriage and the Commission is of the opinion that he had, at the date of such marriage, a reasonable expectation of surviving for at least one year thereafter;

but no payment shall be made under this subsection from a date prior to that from which pension is payable in accordance with Section 42.*

Briefly section 36(3) provides that, where pension is in payment in any of the pension classes 1 to 11 ** inclusive in Schedule A, or where a pensioner has died while on the strength of the Department for treatment and, but for the death, would have been in receipt of pension

* Section 42 sets out the provision under which the payment of a pension arising from death may be made retrospective. The provisions of this section are under discussion here.

** Class 1 is 98% to 100%; Class 11 is 48% to 52%. For purposes of this Section those in Classes 1 to 11 will be referred to as in receipt of pension of 50% or greater, although the minimum percentage required under Class 11 is 48%.

General

at the rate so provided in any of these classes, or where the pensioner's death was attributable to his service, pension may be paid to a widow at widow's rates under the Act provided that:

1. She was married to the pensioner before pension was granted; or
2. Her marriage took place after the grant of such pension, and the death occurred one year or more after the date of marriage or if less than one year, the Commission is of the opinion that, at the date of marriage, the pensioner had a reasonable expectation of surviving for at least one year thereafter.

The provisions for a widow as explained above apply in the same manner to children of a deceased pensioner as provided in Section 26(7) which reads as follows:

The children of a pensioner who has died and at the time of his death was in receipt of a pension in any of the classes one to eleven, inclusive, mentioned in Schedule A or who died while on the strength of the Department for treatment and but for his death would have been in receipt of pension in one of the said classes, are entitled to a pension as if he had died on service whether his death was attributable to his service or not.

For the purposes of this Chapter of the Report, reference to widow shall be taken to include dependent children.

REPRESENTATIONS AND EVIDENCE

Royal Canadian Legion: The Legion forwarded to your Committee a resolution on this subject, approved at its 1966 Dominion Convention, which read as follows:

Pensions for Certain Widows not Otherwise Entitled :

WHEREAS in theory at least the whole intent of the pension legislation is to equate the amount of compensation with the actual degree of disability; and

WHEREAS in practice the legislation defeats this objective by limiting the widow's pension to those whose husbands had at least a 48% disability (and a 50% pension), thus unjustly ignoring the widow (and children) of those who had even as little as 1% less than the stipulated 48%;

THEREFORE BE IT RESOLVED that the Pension Act be amended to provide pensions for the dependants of deceased pensioners where the rate of pension at the time of death was below 48%, such pension to bear the same relationship to widow's pension under Schedule B as the assessment of the pensioner's disability bore to 100% pension.

This resolution dealt with the continuation of pension on the death of the pensioner from causes other than the pensionable disability, where pension was in payment of less than 48%.

HISTORY

The original provision in Canada for pension for a widow following the death of a pensioner was in Section 24 of the 1914 Pension Regulations. This section read as follows:¹

24. If a member of the forces to whom a pension has been granted in either Class 1 or in Class 2 dies, leaving a wife to whom he was married at the time of his incurring the disability in respect of which his pension was granted, or a woman occupying at the said time the position of a wife within the purview of regulation 18, or leaving children by such wife or woman, the pension for the Class next below that granted the said member shall be given said wife or woman, and the allowance on behalf of any child or children shall be continued subject to the restrictions as to age as provided by Regulation 19. On the marriage of the wife or woman her pension shall cease, but she shall be entitled then to a gratuity equivalent to one year's pension.

This provision for automatic pension extended only to widows of pensioners in class 1 or 2, which comprised ratings of 100% down to 80%. The pension rate for a widow was fixed at one class below that of the pensioner. For example, the widow of a 100% pensioner in receipt of pension of \$480. per annum would draw pension at 80% or \$384. The widow of a pensioner at 80% or \$384. per annum would draw pension at 60% or \$288.²

The Pension Regulations were revised under date of June 3, 1916, and the following provision was made in respect of pension for widows.³

If a member of the forces to whom a pension has been granted in any of the classes 1 to 5 dies, leaving a widow to whom he was married at the time of his incurring the disability in respect of which his pension was granted, or a woman occupying at said time the position of wife within the purview of Regulation 18, or leaving children by such widow or woman, such widow or woman shall be entitled, until re-marriage, to pension at the rates set forth for widows

History

in Schedules C and D appended hereto, and shall also be entitled to draw the allowance for each child at the rates set forth in Schedules C and D appended hereto. If the children do not live with such widow or woman the allowance for them may be paid to a guardian. On the re-marriage of the widow or woman her pension shall cease, but she shall be entitled then to a gratuity of an amount equivalent to one year's pension. Orphan children of such member of the forces shall be entitled to allowances at the rates set forth in Section 17.

The revised Regulations provided separate scales of allowance (Schedules C and D) ranging from \$430 per annum for the widow of a private up to \$2,160 for the widows of Commanders and higher ranks (Naval) and Brigadier-General and higher ranks (Militia). The basic rate of \$480 was 80% of the 100% pension of \$600. Hence, the principle of paying widows at approximately one class below the 100% pensioner, as in the 1914 Pension Regulations, was maintained.

In a document entitled "Canadian Pensions and Proposed Bill with Remarks" believed to have been prepared by Mr. Kenneth Archibald, Legal Adviser to the Board of Pension Commissioners, the principle of payment of pension to widows was enunciated as follows: ⁴ *

So much for the soldier himself. The same arguments might be used in favour of the widow and children of a member of the forces when he dies or is killed. Reparation for his death must be paid to them, not because the country is grateful to the soldier or to them, but because the soldier, by having given service to his country, has earned the payment of a debt to his widow and children. The soldier, had he lived, would have been obliged, both morally and legally, to the payment of this debt, and the country having accepted the services of the soldier, must assume his obligations when he dies in the performance of his duties. The principle of debt, therefore, is the strongest part of the foundation of pension law.

* See Volume II, Chapter 13, pages 486 and 487. (Basic Rate)

History

The principle, it would seem from this explanatory note, was that where a soldier's death was due to service conditions, a pension should be paid to the widow. This same principle applied where a soldier was awarded a pension and then died, in that the widow was entitled to a pension if the death was due to service. An automatic feature was included if pension was in payment at 80% or more, in that pension could continue for the widow, even if there was no direct evidence of service relationship in the pensioner's death. This feature was presumably justified on the presumption that, because of the severity of the disability, in most instances it is probable that there would be relationship, and pension could be paid to the widow without the necessity of her having to prove the attributability of his death to a pensionable condition.

The provision for pension for pensioners' widows was contained in Section 33(2) of the original Pension Act of 1919, and read as follows:⁵

Subject to paragraph one of this section, the widow of a pensioner who, previous to his death, was pensioned for disability in any of the Classes 1 to 5 mentioned in Schedule A shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not, provided that the death occurs within five years after the date of retirement or discharge or the date of commencement of pension.

The annotation regarding this Section of the Act was as follows:⁶

There is no change in the law except that the death of the pensioner must now take place within five years from the date of retirement or discharge.

This Section and Section 33(2) continue the principle of insurance for five years after discharge in so far as men disabled 80% or more are concerned.

History

The Royal Commission on Pensions and Re-establishment of 1923-1924 examined this provision in the legislation, and reported on the reason 1923-24 for its adoption, as follows: ⁷

The grounds for this unusual feature in pension legislation were apparently: (1) The impossibility of a man with an 80 percent disability being able to lay up anything for his family and children; (2) The circumstance that the necessary care of the almost totally disabled husband would prevent the wife from earning anything to increase the family income; (3) The helpless position of the wife and children who had acquired a certain sense of security from this regular though restricted pension income, and who were abruptly deprived of it by the death of the father; (4) The probability that the total or nearly total disability would weaken the resistance of the pensioner and thus contribute toward hastening his death, even though the immediate cause was not associated with his service disability; (5) It is also said that the provision had reference to men severely handicapped by a war injury such as the amputations and blind who were particularly liable to accident in civil life and for whom the Section provided a form of insurance for a limited time until they accommodated themselves to their new condition.

These grounds, when summarized, show two general reasons for giving relief to the dependents even though the death was not due to service; (1) because the magnitude of the husband's disability prevented making ordinary financial provision for the future; and (2) because the magnitude of the disability, or the handicap caused by it, may have had some indirect influence in causing death even though definite evidence of this is lacking.

This automatic provision for continuation of pension to a widow where a pensioner died from causes other than a pensionable disability extended at that time only to those in receipt of pension of 80% or more, and only if the death occurred within five years after date of commencement of pension.

In discussing the question of whether or not this time limit should be removed, the Royal Commission's report stated as follows: ⁸

History

The suggestion is that the pension be continued to the dependents in case of need, but, basically, pensions are not granted because of the need of the applicant but because service was a material factor in the death or disability.

The Commission considers that to continue disability pensions after death, from a cause not connected with service, is such a radical departure from well-recognized pension principles that it is not warranted in recommending the further extension.

The legislation was amended under date of June 27th, 1925, to extend the provision that pension would be paid to widows of pensioners of 80% or more, provided the death occurred within 10 years after the date of retirement or the commencement of pension. Previously the legislation required that the death must occur within five years of such date.⁹

1925

An amendment in 1928¹⁰ inserted the words "or who, except for the provisions of sub-section 1 of Section 29 of this Act, would have been in receipt of pension in one of the said classes". This amendment was required by reason of the fact that sub-section 29(1) provided that when the pensioner was taken on treatment strength, his pension was automatically suspended and in lieu thereof, he received treatment allowances. In the case of a death of a pensioner in classes 1 to 5 during hospitalization, therefore, the pension would be under suspension and if he died from causes other than his pensionable disability, his widow would not be entitled to the automatic pension provisions. This was presumably an oversight in the legislation, and the amendment was designed to protect the widow by granting the same entitlement while the man was on hospital strength as if he was in receipt of pension.

1928

History

The 1933 amendment " provided that a widow could receive pension if she had been married to the deceased prior to January 1st, 1930. In effect this replaced the previous tenure clause with the new provision that pension would go automatically to a widow where the pensioner was in receipt of pension of 80% or more so long as she married him prior to the first day of January, 1930.

1933

The 1936 Parliamentary Committee on Pensions and Returned Soldiers' Problems heard representations requesting that widows of pensioners receiving between 50% and 80% be included in the automatic provision for widow's pension when a pensioner died from causes other than his pensionable disability. The Amputations Association submitted the following telegram which was printed in the evidence.¹²

1936

Major C. G. Power,
Hon. Minister of Pensions and Chairman,
Soldiers Parliamentary Committee, Ottawa, Ont.

Amputations Association of the Great War ask your Committee earnest consideration for the widows of classes one to eleven these wonderful women who care for Canada's war disabled deserving of recognition for the worthy and courageous service they have rendered to our comrades Stop Day by day our comrades pass away worrying about how their wives and children will be cared for six ex servicemen lying dead in Toronto tonight Canada's was disabled and widows are looking to your committee for help and security for the future regret I cannot be with you to press the claim of these post war heroes stop Widows amputations and blinded ex servicemen congratulate you as chairman of nineteen thirty-six committee God bless you sir in your great task.

Rev. Sidney E. Lambert OBE, Dominion President,
Amputations Association of the Great War

The submission submitted by the Amputations Association stated as follows in part: ¹³

History

On behalf of seriously disabled pensioners and, particularly, amputations and blinded soldiers, we now desire to comment especially on the necessity of consideration for the widows of pensioners not only in Classes 1 to 5, but from there down to and including Class 11, that is 50 percent:-

- (1) Pensioner disabled to the extent of 50 percent or more must perforce be in the seriously disabled class and, as such, have strictly limited opportunities of materially supplementing pension income and of making provision for the future of their families.
- (2) It has been definitely established that, generally speaking, it has been impossible to establish the direct relationship between war-time injuries and premature deaths of pensioners in this group.

A major amendment was made in this clause in 1939 by extending the automatic provision to widows of pensioners who were in receipt of pension of 50% or more. Previously this clause had applied only to widows of pensioners who were in receipt of pensions of 80% or more.¹⁴

Subject as in this Act otherwise provided, the widow of a member of the forces who was at the time of his death in receipt of a pension in any of classes one to eleven inclusive mentioned in Schedule A of this Act or who, except for the provisions of subsection one of section twenty-nine of this Act, would have been in receipt of pension in one of the said classes, shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not, provided that she was married to him prior to the first day of January, 1930, and provided also that no payment shall be made under this subsection prior to the first day of July, 1939.

The annotation in connection with 1939 amendment read as follows: ¹⁵

The only changes from the present subsection are indicated by the words underlined. This change is necessary for the purpose of extending the provision of the subsection for the benefit of the widow of a member of the forces whose husband was in receipt of a pension at the rate of fifty percent or over at the time of his death.

History

By Order in Council PC 5/3655 dated May 15, 1944, the deadline for the marriage of a pensioner from World War I was extended from January 1, 1930, to May 1, 1944. 1944

By an amendment to the legislation in 1957 the so-called marriage deadline was removed from the Act, leaving the provision that pension would be granted to a widow unless the marriage took place before the disability pension was granted to her husband or, if the marriage took place after the award of pension, the husband must have remained alive for at least one year after marriage, or if he died earlier, the Commission must be of the opinion that, at the time of marriage, he had a reasonable expectation of surviving for at least one year. The amended sections of the Act read as follows: ¹⁶ 1957

36(3) Except as otherwise provided in this Act, the widow of a member of the forces who was, at the time of his death, in receipt of a pension at the rate provided in Schedule A for any of classes one to eleven or who died while on the strength of the Department for treatment and, but for his death, would have been in receipt of pension at the rate so provided for any of those classes, is entitled to a pension as if the member had died on service whether his death was attributable to his service or not, if

- (a) she was married to him before he was granted a pension, or
- (b) her marriage to him took place after the grant of such pension, and
 - (i) his death occurred one year or more after the date of the marriage, or
 - (ii) his death occurred less than one year after the date of the marriage and the Commission is of the opinion that he had, at the date of such marriage, a reasonable expectation of surviving for at least one year thereafter;

but no payment shall be made under this subsection from a date prior to that from which pension is payable in accordance with section 42.

History

37. Except as otherwise provided in this Act, in any case where pension may be awarded under Section 13 in respect of the death of a member of the Forces, his widow is entitled to a pension if:

- (a) She was married to him before he was granted a pension for the injury or disease that resulted in his death, or
- (b) Her marriage to him took place after the grant of such pension and
 - (i) his death occurred one year or more after the date of the marriage, or
 - (ii) his death occurred less than one year after the date of the marriage and the Commission is of the opinion that he had, at the date of the marriage, a reasonable expectation of surviving for at least one year thereafter.

No further changes have been made in this provision of the Act to this date.

The principle concerning payment of automatic pension to widows of pensioners who died from causes other than a pensionable disability was discussed in the House of Commons on December 15, 1945. The Honourable Ian G. MacKenzie, Minister of Veterans Affairs, made the following statement:¹⁷

The reason for the stipulation of fifty percent----
and I believe I was here when this change was made---
was that there was a presumption that when disability
was fifty percent or more, war injuries or war disabilities
might have been a contributing factor in the cause of death.

On September 17, 1957, Brigadier J.L. Melville, Chairman of the Pension Commission, prepared a memorandum dealing with a request that dependants of all pensioners in receipt of an award under the Pension Act should be pensioned on the death of the pensioner, irrespective of the cause of death, or of the percentage of pension in payment. Brigadier Melville's statement in part follows:¹⁸

History

It is necessary, in the first instance, to review the basis on which the dependents are pensionable at the present time, and then to examine the effect of this recommendation.

The dependents of a member of the forces who has died are pensionable when death is attributable to service, irrespective of the rate at which pension is in effect at the date of death.

There is a second and a most beneficial provision in Section 36(3) of the Act. This provides that when pension is in payment at 50% or more at the date of death, the widow and children are pensionable irrespective of the cause of death. This provision in the Pension Act is a most generous one.

Mr. _____ argues that "when a pensioner in classes 12 to 20 inclusive dies he is just as dead as the persons in classes 1 to 11". For classes 12 to 20 inclusive, pensions are paid at from 45% to 5% inclusive.

To examine one simple case, a pensioner may be in receipt of a 5% award for flat feet, incurred during a limited period of service in Canada. The proposal advanced would mean that if he died from any cause whatsoever, his widow and children should be pensionable although obviously his death would have no relationship whatsoever to the pensionable condition.

The main reason for the present provision in the Act is that pensioners of 50% or more are seriously disabled, and it is considered the pensionable condition might play a part, however small, in death.

COMMITTEE RECOMMENDATIONS

- (106) That the Act be amended to provide that a widow or child Proportion
Pension
of a member of the forces who was, at the time of his Widow If
Less than
death, in receipt of a pension of less than 48%, and such
death is not attributable to service, be awarded pension
in proportion to the extent of the assessment in payment
to the pensioner at the time of his death, such proportion
to be calculated as a percentage of the pension under
Schedule B of the Pension Act; (except that where, under
this recommendation, pension would be payable at \$75 or
less per annum, one final payment be made in the equi-
valent of two years pension.)
- (107) That the Act be amended to provide, where pension is in Pension To
Continuo
Dependent
Parents,
Brothers
Sisters
payment to a dependent parent or dependent brother or
sister on behalf of a member of the forces in receipt
of pension and that member dies, such pension be con-
tinued at the full rate permissible under the Act (or
at a lesser rate at the discretion of the Commission)
if the member's death was attributable to his service or
if the pensioned disability was assessed at 48% or greater;
and that, if the death was not attributable to service, or
the assessment was less than 48%, the pension for the de-
pendent parent, or brother or sister be awarded in pro-
portion to the extent of the assessment in payment to the
pensioner at the time of his death, such pension to be
calculated on the maximum pension payable under Schedule B
of the Pension Act or at such lesser amount in the discretion

Committee Recommendations

of the Commission; (except that where, under this recommendation, pension would be payable at \$75 or less per annum, one final payment be made in the equivalent of two years pension.)

COMMENTGENERAL

Your Committee has examined the historical development of this Section in order to determine the basis on which a widow * of a pensioner is entitled to continuation of pension when that member dies. It has been a basic principle of pension law in Canada that when a member of the forces dies during his service, and such death is attributable to or incurred during war service, or is in some way related to peacetime service, a pension is paid to the widow or other dependants. This is based on the concept of reparation, in that the country must assume the member's moral and legal obligations for the support of his dependants, should he die while in the service during wartime, or should his death be in some way related to service in peacetime.

Where a member is released from the forces, is awarded a pension and then dies, his widow is entitled to pension if it can be accepted that the death was in some way connected with military service. Thus, the principle that applies in the award of a pension to a widow for a member who dies while in the service is carried over, and can be applied to an instance where a member is awarded a high disability pension, and then dies.

Your Committee notes that, since 1914, pension legislation for members of the forces has contained what might be termed an "automatic provision" that where a pensioner was in the high disability bracket (80% or more) and dies, it would be considered that there was a relationship between death and his disability.

* Throughout this Section reference to widow shall include reference to dependent children, dependent parent and dependent brothers and sisters.

Comment

This permits widow's pension to be paid without the formality of having to prove that the death was, in actual fact, attributable in some way to the pensionable condition.

The Royal Commission on Pensions and Re-establishment of 1922-24 called this an "unusual feature in pension legislation" and stated that the grounds, in summary, were to provide pension for dependants, even though the death may not have been due to service, firstly, because the magnitude of the husband's disability prevented him from making satisfactory financial provision for the future, and, secondly, because the disability may have in some manner contributed to the cause of death, even though there may be no definite evidence to this effect.

The amendment of 1939, which extended the automatic provision from coverage for pensioners of 80% category down to the 50% category, preserved the "contributory" principle, i.e., dependants of a high disability pensioner were entitled to a continuation of pension on his death on the basis that there was a relationship, although not a direct one - between the death and the pensionable condition. This is verified by the statement made in the House of Commons on December 15th, 1945, by the Honourable Ian A. Mackenzie, Minister of Veterans Affairs, to the effect that "there was a presumption that when disability was 50% or more, war injuries or war disabilities might have been a contributing factor in the case of death." *

Where the pensionable condition is of severe proportion the logic of this feature of the legislation is readily perceived. The fifty per cent level has been arrived at after due consideration of the problem

* See page 877 hereof.

Comment

and no doubt, after a review of statistics and medical opinion. In any event, your Committee does not consider itself qualified to state dogmatically where the line of demarcation should be drawn. Fifty percent is the established figure and your Committee cannot substantiate a reduction or an increase in it. It therefore, in its recommendations, leaves this aspect of the matter as it now stands.

It may be of interest that, as of September 30th, 1966, the division of pensioners in two groups was as follows:

<u>Pensions in Payment</u>	<u>Percentage</u>	<u>Number of Pensioners</u>	
Less than 50%	5	21,627	
	10	34,352	
	15	13,813	
	20	17,296	
	25	7,393	
	30	9,120	
	35	3,087	
	40	6,203	
	45	291	
			Total
			113,182
50% or More	50	9,013	
	55	1,070	
	60	3,669	
	65	743	
	70	2,118	
	75	351	
	80	4,535	
	85	601	
	90	863	
	95	169	
	100	5,650	
			Total
			29,282
			Grand Total
			142,464

Comment

Your Committee considered the question of whether it would be feasible to extend pension on an automatic basis to widows of pensioners who die when in receipt of pension of less than 48%. It is understandable that, to the widow of a pensioner with an assessment just below the 48% cut-off figure, a sense of injustice might prevail by reason of the fact that she is unable to qualify for full pension for lack of a few percentage points in assessment.

Your Committee makes two observations in this regard: Firstly, in all legislation where an arbitrary level is required, those who fail to reach this level by a small margin can legitimately claim some inequity. Nevertheless, arbitrary levels impose this type of selection and leave no alternative. Secondly, under Section 25 of the Pension Act, consideration could be given to the award of full pension where compassionate circumstances exist.

Vested Right

Your Committee considers that a widow and other dependants have a vested right in a pension awarded to a member of the Forces for disability. This right is based on the premise that, by reason of injury, disease or aggravation thereof where such were attributable to, incurred during, or related to military service, the pensioner's earning capacity was reduced in his lifetime, usually during his most productive years.

The dependants of that pensioner should have a moral and legal right to be maintained through the earning capacity of that member, and when the earning capacity has been reduced, and replacement thereof is made by way of pension, the dependant has a vested right in that pension.

Comment

This vested right applies to the pension paid to the dependants while the member is alive, and when he dies, should continue to apply during the lifetime of a widow and dependent parents and dependent brothers and sisters, and during the pensionable age in the case of children.

Pension is an integral part of the economic life of a family. Pension, and the causes from which it arose, in one degree or another affect the entire life of the pensioner -- and likewise that of his wife, family and other dependants. The effect of this does not disappear on the death of the pensioner, but is continued to the extent that the widow and other dependants are subject to the effects of the results of the member's service. While this effect will vary in degree and extent, it is always present. To a man earning \$5,000 a year, for example, a 40 percent pension of \$100 a month represents a significant portion of what he has to live on. To deprive his family of the financial help that he received while alive not only places his dependants in a position of facing a larger problem of re-adjustment, but in effect terminates the acceptance of responsibility on the part of the state, arising from the service of one who was the cornerstone of the family economy. In effect the view is adopted that the family's right to expect anything from the pensioner terminates with his death.

The family has a vested interest in the pensioner's estate and in all that he was. The cut-off of assistance by way of pension on death of the pensioner fails to take proper account of the larger implications of his responsibility.

Comment

Where a pensioner dies from a pensionable disability or where dependants receive automatic pension by reason of the fact that pension was in payment at 50% or more, pension is awarded on the presumption that the disability was a contributing factor in the death. Therefore, it is entirely justifiable that pension be paid at the full rate, as at present.

The "vested right" principle would of course apply to the dependants of pensioners in receipt of 50% or more, but it is not necessary to make it applicable, in that the "contributory" principle takes precedence. When, however, this "contributory" principle does not apply, in that the pension was in payment at less than 48%, the dependants would still be entitled to a portion of pension on the "vested right" principle.

Admittedly, they would have entitlement only to the percentage to which the pensioner's assessment had indicated that he was disqualified in the unskilled labour market. Your Committee considers, notwithstanding, that the vested right should be recognized, and has made a recommendation accordingly.

To summarize, where a pensioner's death is attributable to service, or where the "contributory" principle applies by reason of the fact that pension was in payment of 50% or more, the dependants are entitled to the full rate of pension. Where the pension was in payment at a rate of less than 50%, they would be entitled only to that portion of pension which should be theirs by reason of their vested right, i.e., the percentage of pension being paid to the pensioner at the time of his death.

PENSION FOR WIDOW ON
DEATH OF A PENSIONER

REFERENCES

1. Pension Regulations issued August 4th, 1914.
2. Pension rates in effect, August 4th, 1914.
3. Pension Regulations for Naval Forces of Canada and the Canadian Expeditionary Force. Order in Council P.C. 1334 of June 3rd, 1916.
4. Canadian Pensions and Proposed Bill, Page 13.
5. SC. 1919, C.43 assented to July 7th, 1919.
6. Pension Act with Annotations, July 1st, 1919.
7. Report, Royal Commission on Pensions and Re-establishment 1923-24, Sessional Paper 203, Page 20.
8. Ibid, Page 32.
9. SC. 1925, C.49, assented to June 25th, 1925.
10. SC. 1928, C.38, assented to June 11th, 1928.
11. SC. 1933, C.45, assented to May 23rd, 1933.
12. Minutes of Evidence, Special Committee on Pensions and Returned Soldiers Problems 1936, Page 1.
13. Ibid, Page 11.
14. SC. 1939, C.32, assented to May 19th, 1939.
15. Bill 6, as passed by the House of Commons, May 4th, 1939.
16. SC. 1957, C.19, s.14 and s.15, assented to December 20th, 1957.
17. House of Commons Debates, December 15th, 1945, Page 3582.
18. Canadian Pension Commission Subject File 117.1.

CHAPTER 26

PENSION - CHILD TAKING A COURSE OF INSTRUCTIONGENERAL

Section 26(1)(b) of the Act provides for continuation of pension to age 21 for a child taking a course of instruction. The section reads as follows:

26(1)(b) When such child is following and is making satisfactory progress in a course of instruction approved by the Commission, in which case the pension may be paid until the child has attained the age of twenty-one years.

REPRESENTATIONS AND EVIDENCE

War Amputations of Canada: This Association submitted the following recommendation concerning the continuation of pension for children undergoing education:¹

Recommendation No. 7 - Children's pension to be continued to age 30 if following a course of training.

The Pension Act provides that pension can be extended for children beyond the age of 16 if male, and 17 if female, where such children are pursuing a recognized course of training. This extension is suspended when the child reaches age 21.

This Association submits that a child continuing to undergo university or other training after age 21 is still a financial dependent of the pensioner. Therefore, pension should continue in payment on behalf of such child until the training is completed.

In many instances the suspension at age 21 comes at a time when the child has reached his or her crucial years in so far as financing the training is concerned. For example, the age at which many students enter university is now 19. The average university course is four years. Therefore, the limitation of the Pension Act which requires that pension be suspended at age 21 would normally come at a time when the university student is only half-way through the prescribed course, and when it is still incumbent upon the pension to continue financial sponsorship.

Representations and Evidence

This Association would wish also to make comparison with the Education Assistance Act, which permits a continuation of training allowances until the child reaches his or her 30th year. Accordingly, when the pension for an orphaned child under the Pension Act is suspended at age 21, the training allowance under the Education Assistance Act may be increased on behalf of such child until he or she reaches 30. Conversely, in the case of a child of a pensioner who is still living, the pension which is continued beyond the ages of 16 and 17 respectively for education purposes, is discontinued at age 21, despite the fact that such child is still undergoing a course of training.

The Association respectfully requests that consideration be given to continuation of the payment of pension on behalf of children undergoing training, so long as education authorities will certify that such training is in the best interests of all concerned.

Mr. Jack McIntosh, M.P.: Mr. McIntosh expressed the view that the age limit should be removed in order that youth be encouraged to secure all the education their ability warranted. He referred specifically to Canada's need for specialists.²

Mr. H.W. Herridge, M.P.: Mr. Herridge expressed the view that the Act should not be changed in this respect, and that those seeking higher education should secure their income from other sources.³

COMMITTEE RECOMMENDATION

(108) That Section 26(1)(b) of the Pension Act be amended to provide that pension may be continued on behalf of a child* undergoing a course of instruction up to age of 25 years, or to the date which may be necessary to enable him to complete the academic year in which he attains that age, provided that:

Pension for
Child
Continued to
Age 25 When
Undergoing
Course of
Instruction

- (a) the Commission may extend the period prescribed above where it is satisfied that because of ill health or other good cause the student was unable to resume or commence a course of instruction in an educational institution within the time limit; and
- (b) the pensioner continues to contribute the major share, where possible, of the financial requirements for maintenance and costs associated with the student's schooling.

* Includes dependent child and orphan child.

COMMENT

Your Committee considers that the use of the arbitrary age of twenty-one for discontinuation of pension for a student attending a course of instruction is outdated. The age of twenty-one was first cited in the original Pension Act of 1919. At that time pension could be continued for a boy over the age of sixteen or a girl over the age of seventeen if making satisfactory progress in a course of instruction, provided that the parents could qualify on the grounds of inadequate financial resources. The amendment of the Act in 1951 abolished the means test in cases of application for continuation of pension for students, although the cut-off age of 21 was maintained.

The average of the years spent by students has increased substantially since this provision was placed in the Pension Act in 1919. In addition, more students are continuing their education beyond the secondary school level than was the case then. The average age for graduation from university has also increased. In the view of your Committee, it was probably never realistic to assume that a student would finish his university training at age 21. There is even less justification for using this age as a cut-off for pension now.

Your Committee considers that pension legislation should take cognizance of the trend of the fifties and sixties towards higher education. Considerable emphasis has been placed upon financial support for universities in Canada, and for the students who attend those universities. The provision under discussion should be amended to at least maintain its position relative to what must have initially been intended.

Some veterans organizations appearing before your Committee drew

Comment

attention to the provisions of the Education Assistance Act, particularly in regard to the age limit. This Education Assistance Act, which is administered under the Minister of Veterans Affairs, provides tuition and financial assistance for children of persons who were killed or died while serving, or of pensioners who have died, as a result of service. Under this Act, the assistance may be continued until the student attains the age of 25, and the Minister may extend the age limit beyond 25 years under certain circumstances.

It seems reasonable that the continuation of pension for children under the Pension Act should be subject to the same time limits which apply under the Education Assistance Act. The purpose of the Education Assistance Act, as stated in Section 3 thereof, is to "make allowances to or in respect of students to enable them to continue within an educational institution, their education or instruction beyond matriculation, secondary school graduation or equivalent education". There is no means test and, although the legislation is designed to assist children of a deceased member of the forces, there is no suggestion that it is a financial welfare measure in any sense. It is, so far as your Committee can determine, a means of financial support for children on whose behalf a pension is in payment (at least up to the age of 21 years) because their father's death was related to service. When the pensionable child reaches the age of 21 years assistance under the Education Assistance Act is increased to provide additional allowances during the period the child is going to school.

Comment

Children assisted under the Education Assistance Act are provided with financial support over and above that available under the Pension Act, presumably on the grounds that the parent who served and was responsible for maintenance is dead. Thus, such children are receiving an additional benefit over and above the children of pensioners who are disabled.

This, in view of your Committee, is quite proper. The purposes of the Education Assistance Act are not parallel with those of the Pension Act. The Education Assistance Act is designed to provide assistance for education. The Pension Act is designed primarily to provide financial support. However, the Pension Act does contain supplementary provisions, one of which is to provide additional pension while the child is undergoing a course of instruction.

Here, the similarity between the Education Assistance Act and the Pension Act is recognizable. Both serve the purpose of special assistance for pensionable children who are students. In this respect, therefore, your Committee cannot see the logic in cutting off the pension for children under the Pension Act at age 21, when this is compared with the time limits of the Education Assistance Act, which may be continued to age 25, and beyond 25 in certain circumstances.

It may be argued that the use of the word "child" in the Pension Act implies a responsibility to pay pension only up to the age of 21 years. This, in the view of your Committee, does not seem valid. There is ample justification for regarding a child continuing with his education as remaining in a state of dependency upon his parents. The age of 16

Comment

(17 in the case of a girl) under modern conditions is a reasonable age at which to terminate dependency if the child is going to work for a living; not however if the child remains in school or university.

In the meaning of the Education Assistance Act a "child" may be 25 years of age or more, the only criterion being whether that child requires financial assistance for his education. The application of the same principle under the Pension Act is proposed by your Committee.

The recommendation of your Committee concerning the time limit for continuation of pension for children taking a course of instruction is based on the principles set out in the Education Assistance Act, Section 5(1) and Section 6(3) which read as follows:

- 5(1) No allowance or costs shall be paid under this Act in respect of a student who has attained the age of twenty-five years except in so far as may be necessary to enable him to complete the academic year in which he attains that age.
- 6(3) The Minister may extend the period prescribed by this section where he is satisfied that because ill health or any other good cause the student was unable to resume or commence a course of education or instruction in an educational institution within the time limited by this section.

REFERENCES

1. Proceedings of Committee Sessions, Volume II, Page K-24.
2. Ibid Volume IV, Pages M-25, 26.
3. Ibid Volume V, Page S-15.

CHAPTER 27
CONTINUATION OF PENSION
ON DEATH OF PENSIONER

GENERAL

Section 24 (1a) (b) provides for cessation of pension on the death of a member as follows:

24 (1a) (b)

In the case of a member of the forces in receipt of pension on account of disability in respect of whom additional pension is payable for a wife, child or parent, on the first day of the month following that in which his death occurred:

The effect of Section 24 (1a) (b) is that, upon the death of a pensioner, the pension in payment at married rates * ceases on the first day of the month following that in which the death occurs, and the widow receives pension thereafter at the widow's rate. ***

* \$294 monthly at current rates.

** In this section reference to "widow" shall include "child or parent

*** \$175 monthly at current rates.

REPRESENTATIONS AND EVIDENCE

The representations made to your Committee in connection with widow's pension dealt with the question of continuing the pension in payment at the married rate for sufficient time to permit a widow to complete her rehabilitation plans.

Canadian Paraplegic Association: In a prepared brief, this Association recommended as follows:¹

Continuation of compensation at married rate to the widow of a pensioner in Classes 1 to 9, for a full year following the death of the pensioner.

Section 36(3) provides that automatic pension be paid to a widow of a pensioner in Classes 1 to 11. The reason that the above request applies only to Classes 1 to 9 is that the amount of widow's pension (\$175 monthly at current rates) is larger than the married rate for pensioners in Classes 10 to 11 (\$161.70 and \$147.00 monthly respectively).

Sir Arthur Pearson Association of the War Blinded: In a prepared brief, this Association asked for increased protection of the widows of the war blinded as follows:²

1. The Protection of the Widows of the War Blinded

We - and we alone - know the many, many additional responsibilities forced on our loved ones by our inability to see; she not only acts as housewife and mother, but also as valet, chauffeur, guide and reader, and through her eyes, our visual contact with the world. She has to organize her life around that of her blind husband and has to sacrifice many of the normal recreational outlets available to the wife of a sighted person.

Too often we have seen widows of our war blinded comrades suddenly confronted with all the problems of adjustment and rehabilitation on a sudden income adjustment from \$493 per month down to \$152 per month, the veteran having had very little - if any - opportunity to protect his widow by earned income, insurance etc. because of the severe handicap of blindness. The Department of Veterans Affairs has recognized the need for an adjustment period under the War Veterans Allowance Act, wherein the

Representations and Evidence

full payment of War Veterans Allowance - married rate - is continued for a period of one year on the death of either party, the veteran or his spouse, in other words, for a period of one year following the death of her husband the widow of a War Veterans Allowance recipient receives \$161* per month for a period of one year, then reverts to the single rate of \$94** per month whereas the widow of a 100% disabled war blinded veteran only receives \$152*** - \$9 less, during the important adjustment year. We, however, are not concerned with the \$9 difference for the period of a year and recognize that there is a definite need for a continuance of the allowance to the W.V.A. veteran or his spouse, on the death of one or the other, but we cannot understand why the principle is not made applicable to the widows of our war blinded, who have a far more serious need for the adjustment period, financially and otherwise.

In the past, we have asked that our widows have their income reduced only by the deletion of the amount of Attendance Allowance, for example, the payment of pension and wife's allowance amounting to \$264**** per month for the period of one year. This, of course, is only one suggested solution to the problem which is of such vital concern to our members.

The figures quoted above are those of a totally blind veteran receiving per month \$200 compensation, \$64 wife's allowance and \$229 Attendance Allowance for total blindness. There are approximately 42 war blinded veterans receiving this particular amount.

In supporting this proposal the representatives of the Sir Arthur Pears Association stated that, although they were not basing their case on the same premise as War Veterans Allowance (i.e. a means test), the principle had been recognized of continuing an allowance at married rates for a year following the death of the recipient under the War Veterans Allowance Act, and that this principle would apply equally for pensioners.

* Rate \$175.00 effective September 1st, 1966.

** Rate \$105.00 effective September 1st, 1966.

*** Rate \$175.00 effective September 1st, 1966.

**** Rate \$294.00 effective September 1st, 1966.

Representations and Evidence

Mr. W. Maynes, an executive of the Association, summed up the views of the delegation on this point as follows:³

There is a point I would like to draw here, and perhaps emphasize in this question on widows' full pension and allowance for a widow following one year of the death of the war veteran.

It is our feeling, or we cannot understand why one body of our country's administration, the people in the War Veterans Allowances Administration can see fit to understand the need for the continuance of the pension and allowance for one year, and yet another body, the Canadian Pension Commission cannot see fit to continue this.

Now, it may be, we realize that this would require perhaps legislation to change the circumstance, but we feel that the Canadian Pension Commission, as well as its duties as administering the affairs of the veterans' pension, has another duty, in that it should be able and willing to ferret out these areas of what we consider injustice, and perhaps recommend to the Department of Veterans Affairs that changes should be made.

War Pensioners of Canada (National): This Association made the following recommendation in a prepared brief:⁴

That on the death of a married pensioner or his spouse, the pension at married rates should be continued for a period of one year to the surviving spouse.

Reason: In many cases the pensioner or his spouse during a crucial upset period finds himself or herself suddenly thrust into a financial crisis and may be compelled to make financial decisions detrimental to his or her best interests. In many cases the pensioner's disability precludes life insurance.

Under the provisions of the War Veterans Allowance Act, on the death of the recipient or his spouse, the War Veterans Allowance at married rates may be continued for a period of one year after the death of either the recipient or his spouse under Sections 5(1) or 4(2) of the War Veterans Allowance Act.

We believe that the pensioner or his widow should be entitled to the same consideration as the recipient of War Veterans Allowance.

National Council of Veterans Associations in Canada: The prepared brief of this Association recommended:⁵

That on the death of a married pensioner, Classes 1 to 9 inclusive, war disability compensation at married rate be continued for a period of one year ---

COMMENT: Under the War Veterans Allowance Act it is provided that on the death of a married recipient, or his wife, war veterans allowance shall be continued at married rate for one year. Under the Pension Act, however, there is an abrupt reduction in income for the widow of a pensioner in classes 1 to 9, occurring on the first of the month following her husband's death.

The sudden death of a seriously disabled pensioner leaves his widow ill-prepared to carry on the financial obligations incurred and planned as a family unit. In most cases during the life of the handicapped husband, it has not been possible to establish financial reserves. The widow, during a crucial and emotionally upset period, finds herself thrust into a financial crisis and may, in desperation, be compelled to make decisions detrimental to or even disastrous to her interests.

In support of this recommendation Mr. G.K. Langford, Q.C., chairman of the delegation, stated that his group had referred to the War Veterans Allowance Act for comparison purposes only, and suggested that the principle be extended to the Pension Act. He admitted that pensioners were not invariably in the low income group, as with WVA recipients, but he stated:⁶

We suggest that particularly in class 1, the one hundred percent pensioner, he is less apt, particularly in later years, to be able to supplement his income, and the family is more dependent on the pension income than would be the case of the able-bodied citizen, or even the case of some of the lower categories of pension.

You have a family unit that is dependent on the pension at maximum rates, or near maximum rates, and in many cases in addition, on the attendance allowance. Now admittedly the attendance allowance would disappear with pension, but it is quite an abrupt reduction, to drop this family down to the level of the widow's pension..... In that respect (rehabilitation) the situation is somewhat akin to the War Veterans Allowance man in that he is to a large extent dependent on the Pension Act to support the family.

Representations and Evidence

Mr. John Black, representing the War Pensioners of Canada, stated: ⁷

There is one additional thing that might be brought in here. The War Veterans Allowance recipient, in his younger years, may have been permitted to get insurance, and he could have this insurance paid up and payable at his death; whereas, in a lot of cases, the pensioner has been unable to get insurance on his own behalf due to his disability. That might be something that could be considered.

Mr. Andrew Clarke, representing the Canadian Paraplegic Association, added further views as follows: ⁸

Speaking from experience with the group which I represent, namely, the paraplegics, these men are dying when they are still quite young. Many of them may still have quite young families to maintain. The point I want to make is that it is not a case of a man reaching a mature age, where there is possibly just himself and his wife remaining. It is quite possible that many of these veterans, particularly those in the one hundred percent and over category, die when they are near what would normally be considered the peak of their earning years.

Mr. Langford pointed to the present requirement of the Act, which was that pension at married rates cease on the first day of the month following death, and stated: ⁹

In fact, it merely indicates that if they must pass on to the next world, they do so on the first of the month and not on the thirty-first..... We feel a twelve-month period would not be too unreasonable to allow an adjustment.

Hong Kong Veterans Association of Canada: This Association recommended: ¹⁰

That war disability pensions upon death of the veteran be awarded his widow in the same manner as the widows of recipients of the War Veterans Allowance.

Mr. John Stroud, speaking for the Association, stated: ¹¹

Representations and Evidence

We had in mind that the same thing could happen in the War Veterans Allowances as happens under the Pension Act, the wife and husband are paying for a home, they have furniture and things, they are making payments, they are in their early forties.... All of a sudden her income is slashed quite considerably. He may be an eighty percent pensioner, and besides, the minute he dies, his pension ceases, and his widow is cut down, her finances are approximately half I guess it would be, when you figure out the widow's allowance when they finalize it.

Army, Navy and Air Force Veterans Association In its proposed brief, this Association recommended as follows: ¹²

Death of Married Pensioner: That on the death of a married pensioner - classes 1 to 9 -- pension at married rates be continued for a period of one year.

Comments: Under the provisions of the War Veterans Allowance Act, on the death of the recipient who is married, War Veterans Allowance is continued for a period of one year, after the death of either party. Through the provisions of the Pension Act, Canada has recognized the serious disability of the pensioner in classes 1 to 9 by providing a pension for the widow regardless of the cause of death of the pensioner. The sudden death of a pensioner in classes 1 to 9 leaves the widow ill-prepared to carry on the financial obligations incurred and planned.

In the case of a disabled pensioner who is in receipt of helplessness allowances, the income, the day following the pensioner's death is reduced. The widow, during a crucial and emotional upset period, finds herself suddenly thrust into a financial crisis which seems to have no solution and is in desperation compelled to make financial decisions, detrimental, even disastrous, to her interest, committed as she and her husband were to the purchase of a home or a rental contract. In most cases during the lifetime of the handicapped husband, it is not possible to create reserves. Furthermore, the bread-winner's disability precluded life insurance. We believe that the widow of the pensioner is entitled to the same consideration as the widow of the recipient of War Veterans Allowance, by the continuation of pension at married rates for one year after the death of the pensioner.

Speaking in support of this recommendation, Mr. J.C. Lundberg, President of the Association, stated: ¹³

Representations and Evidence

We say the widow should have a period of a year to readjust herself to the change in her economic life and make any changes, shall we say, if she has a home she can take her time to sell her property and not be forced into a quick sale.

War Amputations of Canada: The prepared brief from this Association suggested: ¹⁴

Pension at Married Rate to Continue for Wife and Children for One Year After Death of Pensioner

The Pension Act, Section 24(1a) (b), provides that, on the death of a pensioner who is responsible for the support of wife, child, parent, etc. pension on behalf of such pensioner will cease on the first day of the month following that in which death occurs.

This creates very considerable hardship for pensioners in the higher categories whose families, generally speaking, are dependent upon the pension as a means of support.

It is contended also that this Section of the Act creates considerable administrative difficulty in dealing with overpayments, all of which causes confusion for the widow during her difficult re-adjustment period.

It is suggested that this Section should be revised to provide continuation of pension at the married rate for a widow (and children where such exist) for a period of one year following the death of the pensioner. This would provide assured income for the re-adjustment phase at a level closer to that to which the widow had become accustomed during the period when her husband was alive.

It is considered that a period of at least one year is required for her to make such new arrangements as might be necessary to pay for shelter and to meet other fixed costs which do not necessarily decrease immediately on the death of a pensioner but which the widow would necessarily have to scale down over a period of time in view of her new financial status.

In the case of a total disability pensioner who was in receipt of attendance allowance, the situation is even worse. The widow would have been "earning" additional income by way of attendance allowance by reason of the fact that she was required to provide special assistance for her husband. The fact that this attendance allowance ceases almost immediately might be compared with an employee being discharged without notice.

Representations and Evidence

In all cases where a pensioner dies, and where the family was subsisting on pension plus any attendance allowance, the widow finds herself thrust suddenly into a financial crisis.

In many such cases the physical condition of the pensioner would have precluded the purchase of life insurance. Also, because of severe physical disablement he would have been unable to accumulate financial reserves. Hence there seems to be strong justification that the married rates and attendance allowance, if any, be continued for one year.

It is suggested in the Pension Act, the same principle should be followed as with the War Veterans Allowance Act, which provides for continuation of payment to the widow at the married rate for a period of one year following the death of a War Veterans Allowance recipient.

The proposal concerning continuation of pension is applicable, of course, only to pensioners in Classes 1 to 9 and/or where the rate of pension, if continued at the married rate under Schedule A of the Act, would be greater than that which the widow would receive as a widow under Schedule B of the Pension Act.

In speaking to the recommendation that pensions at married rate be continued for one year, Mr. K.E. Butler, vice-president, stated: ¹⁵

I think another reason, sir, is that the period of the year should give a widow a reasonable time to re-adjust, it is taking a reasonable amount of time to dispose of assets, to see the estate wound up, this type of thing.

Mr. Jack McIntosh, M.P.: Mr. McIntosh made the following recommendation : ¹⁶

Section 24 (1a) (b) provides that when a pensioner dies and leaves dependents, pension at married rates is discontinued on the first day of the month following the death, and goes into payment only at widow's rate. Veterans organizations complain that this leaves no time for adjustment, and recommend one year similar to the War Veterans Allowance Act.

In supporting the recommendation, he stated that there were considerable "out-of-the-ordinary" expenditures immediately following the death of the pensioner, and that the severity of these would be compounded by an immediate drop in income.

Representations and Evidence

This problem would be intensified where, in addition to pension, the pensioner was in receipt of Attendance Allowance as this also would cease on the first day of the month following the pensioner's death.

L'Association du 22ième Inc.: This Association requested that pension should continue at the married rate for a period of one year. The recommendation from their brief follows: ¹⁷

Recommendation 5: Continuation of pension at married rate to widow for one year.

On the death of the married pensioner, the pension should continue at the married rate for a period of one year. The Pension Act provides that when a married pensioner dies, the pension shall cease on the first day of the month following the death. If the pensioner died from his pensionable disability, or alternatively the pension was in payment in excess of 50%, the pension will continue for the widow, however this rate is only \$152 monthly.

Therefore, for a pensioner who is in the seriously disabled class the immediate drop from 100% pension (plus Attendance Allowances in some cases) to the widow's rate of \$152 monthly represents a severe financial shock, and makes no provision for the widow to re-adjust her standard of living. It must be evident that a widow would have to continue contractual payments for furniture, automobile, rent, school fees, etc. In time she can presumably adjust these, but she needs a period of at least one year in order to make this adjustment. The present legislation creates very considerable financial hardship, even in instances where there is some insurance. In review of this situation, it would appear to be indicated that Canada's seriously disabled veterans are entitled to considerably more protection under the Act for their widows in the event of the pensioner's death.

This Association wishes to point out that the widow of a War Veterans Allowance recipient is in a much more favourable position than the widow of a high percentage disability pensioner, by virtue of the fact that the War Veterans Allowance recipient's widow would continue to receive the married rate of WVA (\$161 per month) for one year following the veteran's death, whereas the widow of the high percentage disability pensioner would receive only \$152 per month during the same period.

Representations and Evidence

Major Paul Clavel, speaking for the Association, stated: ⁴³

What we suggest is that a period of adjustment be granted to let the widow re-adjust psychologically to the loss of the husband, and then it will help to make the necessary adjustments in the budget. Let's face it, we live on installment and a man wants to provide the best for his family; he buys a frigidaire, a car, a T.V. on the installment plan, and at no moment's notice the income drops to a hundred and fifty-two dollars (\$152.00) and the widow cannot keep up the payments; but in a period of a year or two the widow will be able to find a job and get re-adjusted.

COMMITTEE RECOMMENDATIONS

- (109) That Section 24 (1a) (b) be amended to provide that pension continue to be paid for a period of 12 months following the death of a member of the forces in receipt of pension on account of disability in respect of whom additional pension is payable for a wife, child or parent. Pension to Continue For Twelve Months for Wife, Child or Parent
- (110) That the Act be amended to provide that Attendance Allowance shall continue to be paid for a period of two months following the death of a member of the forces who has died and in respect of whom additional pension is payable for a wife who was living with and providing attendance for the pensioner. Attendance Allowance To Continue For Two Months For Widow

COMMENTExtension of Pension at Married Rate for One Year

Your Committee was impressed with the representations to the effect that pension should be continued at the married rate for one year, where a pensioner dies and the rate of pension is greater than the amount the widow, or widow and children, would receive under Schedule "B" of the Act. This provision would be particularly beneficial to widows of pensioners in the higher pension brackets, as it would mean that payments would continue for them at a higher rate than under Schedule "B" * for widows and children of pensioned widows, to which they would be entitled under existing legislation.

To quote an example, a 100% pensioner with a wife and one child would be in receipt of pension at current rates of \$324 monthly. Under the present provisions of Section 24 (1a) (b) the pension income would reduce to \$235 monthly on the first day of the month following death of the pensioner.

The drop in income would be even greater if the pensioner were entitled to Attendance Allowance and, to quote an example here, a married 100% pensioner with one child, in receipt of maximum Attendance Allowance, would have a total income under the Pension Act of \$574 monthly which would reduce to \$235 monthly upon a pensioner's death.

It seems evident that, where a pensioner and his family have established a certain standard of living, based on total income including pension, it is not practicable for the widow to make a re-adjustment in the living expenses of the family in a period of 30 days or less following the death

* Schedule "B" of the Pension Act provides monthly pension as follows:

(1) Widows	\$175.00
(2) Children	60.00 for 1st child, \$104 for 2 children and \$36 for each additional child.
(3) Parents	119.00 (maximum payment)
(4) Brothers and Sisters	\$30 for 1st, \$52 for 2, \$18 for each additional child.
(5) Orphan Brothers and Sisters	\$60 for 1st, \$104. for 2, \$36 for additional child.

Comment

of her husband. This is even more unrealistic if part of the pension income includes Attendance Allowance which, in the view of your Committee is "encumbered income". This means that it is paid to the pensioner to meet the additional costs of his disability, including housing, special vehicles for transportation and other requirements which could not be disposed of overnight.

Frequent reference was made, in the representations placed before your Committee, to a provision in the War Veterans Allowance Act which continues payment to a widow at the married rate for a period of one year following the death of the WVA recipient. The principle in the WVA Act which would be applicable under the Pension Act is the period of time, i.e., one year. War Veterans Allowance is awarded on the basis of financial need and it can be presumed that the provision in the legislation to continue this allowance in payment at the married rate can be justified on the grounds that the widow of a War Veterans Allowance recipient could qualify on a "means test" basis. Pension, on the other hand, is awarded as a matter of right, based on the degree of disability. Financial need is not a factor in the award. It would not be feasible, therefore, to justify continuation of pension at the married rate on the basis of actual financial need. Notwithstanding, your Committee recognizes that the family of a pensioner receiving 50% or more will have established a certain standard of living, and that, regardless of financial assets, the requirement of the family to subsist on a lower pension income following the death of the pensioner should be a gradual one.

Comment

Also, your Committee has taken into consideration the question of life insurance. Pensioners who have a disability of 50% or greater, when considered as a group, may have difficulty in obtaining adequate life insurance. This point becomes more pertinent when it is realized that, for many years, life insurance companies have had access to the medical records of pensioners for the purpose of assessing life insurance applications.*

Your Committee has recommended, in view of all considerations, that the Act be amended to provide that, upon the death of the pensioner, pension should be continued at the married rate (including additional pension for qualified children) for a period of one year for all classes where the rate for widows and children under Schedule B would be lower than that provided under the married rate under Schedule A.

Attendance Allowance

Your Committee has recommended, also, that the Attendance Allowance be continued for a period of 60 days following the death of the pensioner. This recommendation should be studied in conjunction with the Chapter** on Attendance Allowance in this Report, wherein your Committee states what it considers to be the true nature of Attendance Allowance, i.e., that it is intended to meet the additional costs of a pensioner who is severely disabled.

Many of these costs, including special types of housing, would continue to represent an expense to the widow on the death of the pensioner until such time as she could make other arrangements. Also, a wife who has necessarily been tied to her home in an unusual degree has thus deprived herself of any opportunity to earn outside income. Hence, it seems logical that she should be provided with the additional income as represented by the Attendance Allowance for a period of 60 days, in which she could re-adjust.

* See Chapter 38 hereof, (Disclosure of Information from Pensioner's file)

** See Chapter 17, Volume II of this Report.

CONTINUATION OF PENSION
ON DEATH OF PENSIONER

REFERENCES

1. Proceedings of Committee Sessions, Volume I, Page A-13.
2. Ibid, Volume I, Page B-4.
3. Ibid, Volume I, Page B-13.
4. Ibid, Volume I, Page E-6.
5. Ibid, Volume I, Page F-12.
6. Ibid, Volume I, Page F-13.
7. Ibid, Volume I, Page F-13.
8. Ibid, Volume I, Page F-14.
9. Ibid, Volume I, Page F-14.
10. Ibid, Volume II, Page H-36.
11. Ibid, Volume II, Page H-37.
12. Ibid, Volume II, Page J-7.
13. Ibid, Volume II, Page J-7.
14. Ibid, Volume II, Page K-30.
15. Ibid, Volume II, Page K-32.
16. Ibid, Volume IV, Page M-27.
17. Ibid, Volume IV, Page Q-6.
18. Ibid, Volume IV, Page Q-7.

CHAPTER 28

PENSION - WIDOW NOT
LIVING WITH PENSIONERGENERAL

Section 36(1) of the Pension Act imposes certain limitations on the awarding of pension to a widow who was not living with, nor being maintained by, a pensioner who has died. This Section reads as follows:

- 36(1) No pension shall be paid to the widow of a member of the forces unless she was living with him or was maintained by him or was, in the opinion of the Commission, entitled to be maintained by him at the time of his death and for a reasonable time previously thereto.

This section is affected by Section 36(5) which provides that, if the widow is in a dependent condition, the Pension Commission may pay pension, in its discretion, even though she was divorced, judicially separated or separated from the pensioner pursuant to a written or other agreement. This Section reads as follows:

- 36(5) A woman who has been divorced, judicially separated or separated pursuant to a written or other agreement from a member of the forces who has died is not entitled to pension unless she was awarded alimony or an alimentary allowance, or is entitled to an allowance under the terms of the separation agreement, in which case she is entitled, if she is in a dependent condition, to the equivalent of the widow's pension, or the equivalent of the alimony or alimentary allowance that she was awarded or the allowance to which she is entitled under the terms of the separation agreement, whichever is the smaller in amount; except where that amount is smaller than the widow's pension it may, in the discretion of the Commission, be increased to an amount not exceeding that provided in Schedule B for a widow.

A further provision is that, notwithstanding Section 36(5) which provides that the widow must have been in receipt of, or be entitled to an allowance, widow's pension may still be granted if the Commission considers she would be entitled to such allowance had she made application under law. This reads as follows:

General

- 36(6) Notwithstanding subsection (5), where a woman has been divorced, judicially separated or separated pursuant to a written or other agreement from a member of the forces who has died, and such woman is in a dependent condition the Commission may, in its discretion, award a pension at a rate not exceeding the rate provided in Schedule B for a widow although such woman has not been awarded alimony or an alimentary allowance or is not entitled to an allowance under the terms of the separation agreement if, in the opinion of the Commission she would have been entitled to an award of alimony or an alimentary or other allowance had she made application therefor under due process of law.

The application of these sections has given rise to controversy, as reported in the brief submitted by the Veterans' Bureau particularly in regard to interpretations of "entitled to be maintained" * and "separated by agreement" **

Interpretation of "entitled to be maintained".

The policy of the Commission regarding interpretation of "entitled to be maintained" as set out in the Minutes of General Meeting of the Pension Commission under date of April 8th, 1958, was as follows: ²

It must be emphasized that under the Pension Act, additional pension for a wife flows primarily from the man's status and not the wife's. What she is entitled to as a wife under the law does not necessarily establish her rights under this Section of the Act. The Act definitely states no pension shall be paid to the widow of a Member of the Forces unless she was living with him or was maintained by him at the time of death and for a reasonable time previously thereto.

In the second clause "or was, in the opinion of the Commission, entitled to be maintained by him at the time of his death", etc., there is no reference to any legal rights as a wife. In considering cases of this kind the Commission reviewed all available evidence. This may be contradictory and controversial, and not infrequently, and after weighing all this evidence, expressed their opinion as required by the Act. Even if there is evidence that she has established certain rights by legal procedure, the Commission is not bound by these findings, but may

* See Section 36(1) of the Pension Act

** See Section 36(5) of the Pension Act

General

be and frequently is influenced by this situation in arriving at their decision. It is readily appreciated that the same set of circumstances do not exist in all cases and hence the Committee does not consider it possible to state any definite policy on interpretation of this section of the Act, as the situations encountered do not lend themselves readily to any one set of requirements.

Interpretation of the words "separated by agreement".

The policy of the Commission regarding interpretation of "separated by agreement" as set out in the Minutes of General Meeting of the Pension Commission under date of April 8th, 1958, was as follows:³

It is not considered that any comment is necessary when there exists any definite legal separation agreement. The pensioner may be free of any obligation towards his wife or he may have agreed to pay a certain stipulated sum towards her support. In the latter situation, the Commission action re additional pension or division of pension is governed pretty well by the terms of agreement and evidence that the pensioner is observing these terms.

In cases where pensioner and wife separated without any legal agreement and the evidence indicates that the separation existed for some years prior to pensioner's death, there is no evidence that he has ever contributed towards his wife's support and nothing is heard from the wife until, following pensioner's death, she applies for widow's pension, unless there is evidence to the contrary it is reasonable to assume that the wife had accepted this situation as satisfactory over a period of years and that the separation can be considered as a tacit agreement. In some cases the widow maintains that for various reasons it was impossible for her to continue to live with the pensioner. Cruelty, drunkenness, mental defect, on pensioner's part are frequently cited as a cause for separation.

The Commission has, in many situations of this kind, ruled favourably under this section of the Act. In other situations where evidence is contradictory, meagre and non-existent, the Commission may rule unfavourably. When reviewing these cases the Commission considers all the circumstances. This Committee does not consider it possible, in view of circumstances as set forth above, to establish any definite formula of interpretation which would be applicable to all cases. Each case must be considered on its merits under the provisions of the Act.

REPRESENTATIONS AND EVIDENCE

Royal Canadian Legion: The Legion, in a prepared brief, stated as follows: ⁴

We find that the Commission, in making an award under this sub-section in many instances refuses to grant the maximum pension permitted under Schedule B. Generally the Commission will not grant an award in excess of the amount which the woman had been receiving from the Commission during the pensioner's lifetime. We believe that since the Commission has previously recognized the woman, it is in effect an admission that she was entitled to be maintained and that she had not been at fault in bringing about the separation. We suggest the Commission should, where circumstances warrant, pay the maximum award permitted by the legislation.

In this connection, Mr. Chairman, we have one case where the Commission, in a decision on December 9, 1965, awarded in a case of this nature, or granted an award of \$150 when they could have granted one of \$152. It seems to us that this is drawing the line rather fine in exercising discretion and that they could have gone the maximum under the legislation.

In other cases if the woman was only receiving an amount of \$65 during the man's lifetime they will refuse to give her more than the \$65 she was receiving, even though they could go up to the maximum.

Again, we suggest that this is not in keeping with the intent as stated in the Interpretation Act, and it does not seem to be giving it a fair and generous meaning.

Canadian Pension Commission: Mr. T.D. Anderson, Chairman of the Canadian Pension Commission, commented as follows in regard to the Legion representation: ⁵

In effect, the Legion is simply suggesting here that we should always pay the maximum and completely disregard our discretionary authority as provided in this section.

The statement that the Commission will not grant an award in excess of the amount which the woman had been receiving from the Commission during the pensioner's lifetime is completely incorrect. If and when she needs more she gets more and many of these pensioners end up receiving the maximum. The Legion hears only from the relatively few who, because of other income or for some such reason, do not.

Representations and Evidence

The War Amputations of Canada: Lieut-Col. S.E. Lambert, Dominion President of this Association, in a letter forwarded to your Committee under date of May 30th, 1966, made reference to a requirement under the Act that a widow who was separated from a pensioner prior to his death may receive pension only if she is in a financially dependent condition. His letter suggested that where the pensioner had recognized and maintained his wife during his lifetime, she was entitled to full widow's pension should the pensioner predecease her.

The letter referred to a case of a widow who had been separated from a pensioner for a period of nearly 30 years during which he had maintained her as his wife. Upon his death the pension had been discontinued as the widow was not in dependent circumstances. The letter stated: ⁶

It seems exceedingly strange now that, under the Pension Act, she cannot be recognized as his widow unless the application of a means test finds her in financial distress.

I have dealt with this aspect of the Pension Act for many, many years. I have never quarreled with the principle that pension belongs to the man who was disabled in the service of his Country, and that any allowance for his dependents must necessarily rest upon rights which the dependents may have to be maintained, by the pensioner. However, in a case such as this where the pensioner willingly accepted his responsibility, or even in those cases where a court may have forced him to do so, it seems to this Association that if and when the pensioner dies, the widow should qualify in the same manner and for the same allowance as any other widow under the Act.

I have discussed this aspect of pension with representatives of the Commission on numerous occasions. I have always been told that the main principle in the Act is that a widow who was not living with her husband prior to his death has no right or claim for pension after his death. It has always been explained to me that the provision to grant pension to a widow of this type if she is in dependent circumstances is a generous concession.

Representations and Evidence

We in the War Amputations of Canada cannot consider it so. We hope that your Committee could make a close examination of the situation, with a view to recommending an amendment of the legislation to assist widows in this category.

HISTORY

The provision now contained in Section 36(6) of the Pension Act, was proposed in Bill 329, approved by the House of Commons under date of August 1st, 1946. The new section was added to the Act as follows: ⁷

1946

32(4)(b) Notwithstanding anything contained in paragraph (a) of this subsection, when a woman has been divorced from a member of the forces, and such woman is in a dependent condition the Commission may, in its discretion, award such pension not exceeding the rates set out in Schedule B to this Act, as it deems fit in the circumstances, although such woman has not been awarded alimony, if in the opinion of the Commission she would have been entitled to an award of alimony had she made application therefor under due process of law.

The annotation explaining this new subsection read as follows: ⁸

Paragraph (b) is new and gives the Commission power to award pension even though no alimony has been provided for if, in the opinion of the Commission, the divorced woman would have been entitled to alimony had she applied for it.

This provision was expanded in 1951 to read as follows: ⁹

32(4)(b) Notwithstanding anything contained in paragraph (a) of this subsection, when a woman has been divorced, legally separated or separated by agreement from a member of the forces who has died, and such woman is in a dependent condition, the Commission may in its discretion, award such pension not exceeding the rates set out in Schedule B to this Act, as it deems fit in the circumstances, although such woman has not been awarded alimony or an alimentary allowance or is not entitled to an allowance under the terms of the separation agreement, if in the opinion of the Commission, she would have been entitled to an award of alimony or an alimentary allowance or an allowance had she made application therefor under due process of law.

1951

The annotation explaining the amended subsection read as follows: ¹⁰

The paragraph to be repealed at present reads as follows:

(b) Notwithstanding anything contained in paragraph (a) of this subsection when a woman has been divorced from a member of the forces, and such woman is in a dependent condition, the Commission may, in its discretion award such pension not exceeding the rates set out in Schedule B to this Act, as it

History

deems fit in the circumstances, although such woman has not been awarded alimony, if in the opinion of the Commission, she would have been entitled to an award of alimony had she made application therefor under due process of law. Some people are barred by religion or otherwise from obtaining divorce and can only obtain a legal separation. The amendment will permit the Commission to extend the same discretion to women legally separated as is already extended to the divorced woman and conforms to the provisions of the preceding paragraph in the Act.

It will be noted from the above that this provision first came into the Pension Act in 1946, and was expanded in 1951. A search of Parliamentary Committee records by your Committee staff has failed to reveal any evidence that the amendment, or the expansion thereof, was proposed by veterans organizations, or was discussed in the official meetings of Parliamentary Committees of either 1946 or 1950-51.

COMMITTEE RECOMMENDATIONS

(111) That Section 36(5) be amended to provide that a woman who has been divorced, judicially separated or separated pursuant to a written or other agreement from a pensioner who has died shall be entitled to pension if she has been awarded alimony or an alimentary allowance by court order or under the terms of a separation agreement in an amount not less than that she was receiving by agreement or court order; and that this amount be adjusted commensurate with any revisions in the rate of pension under Schedule B of the Act.

Widow to
Receive Pension
In Amount of
Allowance Prior
To Pensioners
Death

(112) That Section 36(6) of the Act be deleted so that a widow who has been divorced, judicially separated or separated from a pensioner pursuant to a written or other agreement but who has not been maintained by him; and had not been awarded alimony or alimentary allowance by Court order or under the terms of agreement, would not be able to request the Commission to decide whether she would have been entitled to an award or other allowance had she made application therefor while her husband was alive.

Widow Must
Establish
Maintenance
Rights Prior
to Pensioners
Death

COMMENT

The provisions of Section 36(5) and (6) of the Act appear, in some respects, to be a contradiction of the principle of Section 36(1) which is to the effect that no pension should be paid to the widow of a member of the forces unless she was living with and was being maintained by him, or was entitled to be maintained by him, at the time of his death.

The basic premise, in the view of your Committee, is that enunciated in the policy approved by the Pension Commission at its meeting under date of April 8th, 1958, during which it was stated:

It must be emphasized that under the Pension Act, additional pension for a wife flows primarily from the man's status and not the wife's. What she is entitled to as a wife under the law does not necessarily establish her rights under this Section of the Act.

Assuming this premise to be correct, your Committee finds difficulty in accepting the fact that, where a pensioner has voluntarily, or under a court order, maintained a woman, even though she may have been divorced or separated from him, this woman's right to pension may be denied upon his death.

In one case examined by your Committee it seemed quite clear that, although a separation had been in existence for many years, the pensioner himself continued to recognize the status of his wife and, in fact, a few months before his death he voluntarily increased the maintenance allowance even though she was employed at the time. "

Your Committee considers that the rights of a widow, which flow from the military service of her husband, should not be affected by her financial status. Your Committee has therefore recommended that, should the pensioner predecease her, she should receive pension in the same amount as the alimony or other allowance which she was receiving by an agreement or court order prior to the pensioner's death, but not in excess of widow's pension.

Comment

upon during his lifetime, declare herself in a dependent condition and make application for widow's pension. The view of the Pension Commission in its interpretation given in regard to this matter at the Commission's general meeting of April 8th, 1956, is of interest. It was stated: ¹²

In some cases the widow maintains that, for various reasons it was impossible for her to continue to live with the pensioner. Cruelty, drunkenness, mental defect on the pensioner's part are frequently cited as the cause of separation. The Commission has, in many situations of this kind, ruled favourably under this Section of the Act.

This means that a widow could charge a deceased pensioner with unacceptable conduct, against which the pensioner could not defend himself. Bearing in mind that the pension was earned by the pensioner in the service of his country, through disability which he bore in his lifetime, there seems little validity in a provision under which his widow could benefit after his death if, while he was alive, he did not accept the responsibility to maintain her, and she did not take the steps available to her under law to pursue any rights she may have had.

In raising this matter, your Committee desires to draw attention to the possibility that the existence of such clause in the Pension Act may well represent a disservice to the pensioner while he is alive. Where there has been marital breakdown and there are grounds for separation by reason of the conduct of the pensioner, a wife may be hesitant to take the necessary steps because a court order may deprive her of widow's pension in the event that he should predecease her.

It seems entirely possible, therefore, that in some cases the provisions of the Pension Act may provide a reason for a wife not to pursue the matter of a legal remedy, even though sufficient grounds exist.

Comment

Your Committee considers that the Act should be amended to remove Section 36(6) on the grounds that its existence represents an opportunity for a widow to attempt, after the death of her husband, to secure recognition in regard to her rights of maintenance, where she made no effort to pursue these rights while he was alive.

Your Committee considers that the provisions of Section 36(5) are sufficiently generous in that a widow who had been divorced or separated pursuant to a written or other agreement can receive pension if she is entitled to an allowance (and your Committee considers that this pension should be at the full rate). This would mean that a wife who was not living with, nor being maintained by a pensioner, should have to determine her rights while he is alive.

It is obvious that there could be exceptional cases of hardship arising from the deletion of Section 36(6). Your Committee is of the view, however, that these could be considered by the Pension Commission in accordance with the provisions for compassionate pension under Section 25 of the Act.

The representation from the Royal Canadian Legion suggested that, in certain circumstances, the Pension Commission restricted the payment of widow's pension under Section 36(5) or 36(6) to the amount that she was receiving during the pensioner's lifetime.

Your Committee considers that a widow should continue to receive the same allowance after the pensioner's death as was in payment to her prior to the death, with the added provision that, should the rate of pension

Comment

for widow under Schedule B be revised, the amount in payment to a widow who was divorced or separated from the pensioner prior to his death be adjusted accordingly.

The Pension Commission, in a letter, advised your Committee that the number of cases involved as of July 22, 1966 was as follows: ¹³

- (a) Widows receiving pension under Section 36(5) - 348
- (b) Widows receiving pension under Section 36(6) - 14

PENSION - WIDOW NOT
LIVING WITH PENSIONER

REFERENCES

1. Proceedings of Committee Sessions, Volume VI, Page KK-59.
2. Minutes, General Meeting, Canadian Pension Commission, April 8th, 1958.
3. Ibid.
4. Proceedings of Committee Sessions, Volume III, Page L-155.
5. Ibid, Volume IV, Page R-55.
6. Committee Case File No. 7.
7. S.C. 1946 c.62, assented to August 31st, 1946.
8. Bill 329, as passed by the House of Commons, August 1st, 1946, Page 12.
9. S.C. 1951, c.56, assented to June 30th, 1951.
10. Bill 288 as passed by the House of Commons, June 30th, 1951, Page 5
11. Committee Case File No. 7.
12. Minutes, General Meeting, Canadian Pension Commission, April 8th, 1958.
13. Letter, dated July 22nd, 1966, from Secretary, Canadian Pension Commission to the Secretary of this Committee.

CHAPTER 29

IRREGULAR UNIONS *GENERAL

Section 34(5) of the Act provides as follows:

34(5) For the purposes of this Act, a veteran who:

- (a) is residing with a woman with whom he is prohibited from celebrating a marriage by reason of a previous marriage either of such woman or of himself with another person, and
- (b) shows to the satisfaction of the Commission that he has for seven years or more, continuously maintained and publicly represented such woman as his wife,

shall, where the Commission in its discretion so directs, be deemed to be married to that woman, and upon the death of the veteran at any time while so deemed to be married, such woman shall, where the Commission in its discretion so directs, be deemed to be his widow.

Section 34(6) of the Act makes provision for a woman who was residing with a pensioner to be deemed his widow for purpose of the Pension Act under certain specified circumstances. This section reads as follows:

34(6) For the purposes of this Act, a woman who:

- (a) was residing with a veteran immediately prior to his death and was prohibited from celebrating a marriage with him by reason of a previous marriage either of such veteran or of herself with another person, and
- (b) shows to the satisfaction of the Commission that she was, for seven years or more, continuously maintained and publicly represented by such veteran as his wife.

shall, where the Commission in its discretion so directs, be deemed to be the widow of that deceased veteran.

The Pension Commission's policy dealing with cases under Section 34(6) is similar, where applicable, to that which applies under Section 34(5) where the pensioner is still living. Accordingly, in this section references to Section 34(5) will apply to Section 34(6).

* The term irregular union is used herein to describe a marriage which cannot be regularized because one or both parties are unable to marry by reason of a previous marriage. The term "common law" is applicable only in cases where both parties are competent to marry. The Pension Act does not recognize "common law" union for purposes of pension award.

General

In dealing with the cases coming under the provisions of Section 34(3) the Commission requires that, when an application is made for additional pension, the pensioner must produce the following in support thereof:¹

1. Documentary evidence establishing that a bar to marriage on the part of either himself or the woman concerned has existed, and proof that such bar still exists.
2. A statutory declaration by himself covering his own marital history and setting out in detail the date and place at which the association forming a basis of the present application commenced with detailed particulars as to the places of residence, employment, etc., from that time until date of application, and the statement that he has at all times during such period continuously maintained and publicly represented the woman as his wife.
3. A similar declaration from the woman concerned, containing a definite statement that she has at all times during the association been publicly represented by the pensioner as his wife and wholly maintained by him.

The procedure followed within the Claims and Review Branch of the Commission in the investigation of applications under Section 34(5) is that the following be obtained:²

1. Letters from two disinterested parties concerning the marital situation;
2. Marriage certificates;
3. Proof of the termination of any previous marriage;
4. Proof that the missing spouse is alive and no action has been taken to terminate the marriage.

If no information is available as to the missing spouse, details are required as to relatives and their addresses in an endeavour to ascertain the whereabouts of the missing spouse. If such details are not forthcoming, the pensioner is advised to consult his solicitor.

When a spouse has been missing for more than seven years, or the pensioner believes that she is deceased and the applicant is unable to produce evidence that a bar to marriage exists, he is asked to consult

General

his solicitor with a view to obtaining a presumption of death. If a presumption of death cannot be obtained, he is advised to have his lawyer inform the Commission in this connection.

The Commission requires periodic review in accordance with the following policy decision:³

Cases where additional pension is paid under Section 34(5) are to be reviewed every three years.

The usual procedure in carrying out a review is for a representative of the Commission to contact the estranged spouse. This procedure can create difficulties as determined by your Committee staff in discussions with personnel of the Claims and Review Branch of the Commission, as follows:

- (1) It is often necessary to attempt to contact the spouse who is living in a foreign country.
- (2) Where the missing spouse has made a new life it can lead to embarrassment in the following situations:
 - (a) If a son or daughter has been led to believe that the pensioner is not alive;
 - (b) If the missing spouse is living in a domestic relationship with another man, and has not proclaimed the existence of a previous marriage;
 - (c) If the missing spouse is living under another name.

There may also be an understandable reluctance on the part of the pensioner to disturb the situation in regard to a missing spouse, as such may lead to an action against the pensioner for support.

Under the Commission's policy, representatives of the Department of Veterans Affairs are forbidden to make reference to benefits under this Section of the Act, even if they have information which indicates the possibility of an award in an irregular union.

This policy was set out in a directive to Pension Commission staff dated March 20th, 1961, as follows: ⁴

General

It must be understood that under no circumstances will applications be invited from a pensioner.

This instruction was communicated to veterans welfare officers of the Department of Veterans Affairs under date of April 11, 1961. The Commission file contains further references to the effect that a veterans welfare officer must not invite or suggest an application for pension at married rates under Section 34(5) of the Pension Act, even though he may have knowledge of the fact that the pensioner's circumstances are such that there would be a possibility of him qualifying for married rates under the Act. One letter from the Chief, Special Services, Veterans Welfare Services, Department of Veterans Affairs, states in part: ⁵

Such actions by veterans welfare officers are contrary to the wishes of the Canadian Pension Commission. It would be advisable for you to inform all veterans welfare officers that they should not invite or suggest applications for pension at married rates under Section 34(5) of the Pension Act.

Also, in regard to Section 34(6) which provides pension, under certain circumstances, for the widow of a pensioner who was living in irregular union, Commission policy provides that applications will not be invited, nor will files of deceased pensioners be reviewed. This policy is set out as follows: ⁶

No applications under this sub-section will be invited, nor will files of deceased pensioners be screened to determine whether or not an application might have been entertained had similar legislation been in effect at the date of the pensioner's death.

REPRESENTATIONS AND EVIDENCE

Your Committee received a number of complaints from individual pensioners concerning the difficulty of meeting the Commission's requirements to establish that a bar to marriage existed, where the pensioner had been residing with a woman with whom he had been prohibited from celebrating a marriage by reason of a previous marriage.

Royal Canadian Legion: In a prepared brief, the Royal Canadian Legion made the following submission concerning Section 34(5): ⁷

The problem which arises under this subsection is with respect to the Commission's insistence that the pensioner establish conclusively that he is not able to enter into a legal marriage with the woman with whom he is residing because a former marriage has not been properly dissolved either by court proceedings or death. We have cases in which the Commission has recognized the union, but a year or later insists that the pensioner confirm that he is still unable to enter into a legal union with his present "wife". It is our understanding that in order to obtain a marriage licence in Canada an applicant must establish that he (she) is legally free to do so. If a man, therefore, makes application for a licence, stating that he had been previously married but is unable to say whether his first partner is dead or that the union has been legally dissolved, he could not obtain a marriage licence. There is, therefore, a bar to marriage - and in fact he is prohibited from celebrating a marriage to the woman with whom he is residing, by reason of a previous marriage, either of the woman or himself with another person. If the Pension Commission were to interpret this section as remedial, rather than in a restrictive manner, these problems, would not arise.

In explanation of this matter, Mr. Donald M. Thompson, Dominion Secretary of the Legion, told your Committee that a problem was being created by the insistence of the Pension Commission that the pensioner must produce evidence that his spouse was still living and that there has not been divorce. He stated that a number of these cases involved spouses living in other countries who had obtained divorces under their own law, but these

Representations and Evidence

divorces were not legal in Canada. This created a problem for the Canadian pensioner as the divorce was not recognized in Canada.

Veterans' Bureau: In reply to a question prepared by your Committee Brigadier P.E. Reynolds, the Chief Pensions Advocate, stated that the Bureau experienced considerable difficulty in establishing claims for additional pension on behalf of irregular union wives. Brigadier Reynolds stated: ⁸

The main problem encountered with applications under this Section is endeavouring to satisfy the Commission that the applicant is "prohibited from celebrating a marriage".

The Chief Pensions Advocate tabled with your Committee a memorandum that he had submitted to the Chairman of the Canadian Pension Commission under date of November 16, 1962. This memorandum read in part: ⁹

I am somewhat concerned with what appears to be the present policy of the Commission to give Section 34(5)(a) and 6(a) a very strict interpretation in so far as the words "prohibited from celebrating a marriage by reason of a previous marriage" is concerned.

It seems to me that parties living in the circumstances contemplated by the Section are in fact and in law prohibited from celebrating a marriage if in fact they are unable to obtain a marriage licence.

When a party applies for a marriage licence he is required to complete a statutory declaration in a form prescribed by statute which elicits information with regard to a previous marriage, death of former spouse, or dissolution of the previous marriage. If the declaration discloses a previous marriage and the applicant for a licence is unable to affirmatively state that his spouse is dead or that the marriage has been dissolved, the issuer of marriage licences will refuse to issue a licence. It would appear to me that, on proof of these facts, it is established that a party is prohibited from celebrating a marriage. The fact that he does not know whether his spouse is alive or dead is in itself a bar to a subsequent marriage because in law there is a very strong presumption that a person is alive at any particular time. In fact, the courts only have authority to make an order of presumption of death for limited purposes prescribed by statute, e.g., for the purpose of obtaining a marriage licence, for

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purposes of life insurance, to settle an estate. In the absence of a declaration of the Court that a person is presumed to be dead, in law he is presumed to be alive.

It is submitted that to require the applicant or for the Commission itself to embark upon an enquiry to produce affirmative evidence that a party is either dead or alive is both futile and frustrating in most cases.

Spouses who depart from the marital home leave as little trail behind them as possible and usually succeed in completely throwing an inquirer off the track by the simple expedient of adopting an alias.

This inquiry is further complicated by the fact that the missing spouse does not usually wish to be located and he is therefore unlikely to come forward in response to an advertisement in a newspaper. I know from experience that an inquiry made for the purpose of obtaining a declaration of presumption of death is prolonged and expensive and such an inquiry is simple compared with an inquiry to establish the fact of life or death as negative evidence is all that is required to secure an order of presumption of death.

It should be further pointed out that if the Commission feel that proof that the former spouse is still alive is required before it is established that there is a bar to marriage, to be consistent, the Commission should go still further in its search for the facts and ascertain each of the domiciles that the missing spouse has resided in since the marriage, and then ascertain if any of the Courts of each of these domiciles dissolved the marriage. This inquiry is equally important in law to the inquiry regarding death.

This argument can, of course, be carried on ad absurdum and it might be suggested that, if the Commission requires proof that the former spouse is not dead and the marriage is not dissolved that the whole question of the validity of the marriage should be investigated. It is possible that it was a bigamous marriage and if such was the case, there would be no prohibition to the parties in question celebrating a marriage.

I have raised these points in an effort to show that an extensive inquiry with regard to the possible death of the former spouse is not sufficient if the Commission wishes to give the section in question a strict interpretation. I hope that I have demonstrated, in view of the presumption of life, that the Commission would be perfectly justified in granting an applicant the benefit of the section on the production of a marriage certificate referring to one of the parties and by the production of a statutory declaration from that party in which he declares:

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- (1) That he is the party referred to in the marriage certificate.
- (2) That to the best of his information and belief the other party referred to in the marriage certificate is still alive;
- (3) That to the best of his information and belief the marriage referred to in the marriage certificate has not been dissolved by a Court of competent jurisdiction.

Brigadier Reynolds tabled a reply from the Chairman of the Commission written under date of January 24th, 1963, which read as follows: ¹⁰

This matter was considered in some length at a meeting which was held here from January 2nd to 4th, but the ultimate decision was to the effect that "refusal to issue a licence to marry cannot in itself be accepted as final proof of the existence of a bar to marriage under subsection 5 of Section 34, but that such refusal would constitute evidence of substantial weight in determination of the issue".

Unfortunately, the reason that this particular requirement is contained in Section 34(5) and (6) of the Act has, I am afraid in many instances been completely overlooked. As you know, it was designed to ensure that people would not live in this particular relationship if it were possible for them to become legally married. Without such a proviso, it is doubtful that the Section introduced into the War Veterans Allowance Act some years ago would have been acceptable to the people of Canada and their representatives in Parliament, and the same applies to the legislation which now is contained in the Pension Act.

The following discussion between your Committee Chairman and Brigadier Reynolds is recorded below: ¹¹

Brig. Reynolds: The only comment I make is that I do not think the legislation ever contemplated the search being made to ascertain if the other party to the marriage was still alive, and the mere fact that they cannot secure a licence to marry is a bar to marriage as far as I am concerned.

Mr. Justice Woods: They have to determine, I am afraid, under Section 34(5) that the veteran is residing with a woman with whom he is prohibited from celebrating a marriage by reason of a previous marriage?

Representations and Evidence

Brigadier Reynolds: Yes.

Mr. Justice Woods: It is simply a matter of them deciding the amount of proof they require, and your view is at the present time they are requiring in effect conclusive proof?

Brigadier Reynolds: Quite

Mr. Justice Woods: Rather than taking any balance of probability or anything such as this?

Brigadier Reynolds: It is almost imposing an impossible task in some cases to trace the missing spouse.

Mr. Justice Woods: I can see how it would be. But they want to know that the spouse is alive?

Brigadier Reynolds: Yes

Mr. Justice Woods: Not that he is likely to be alive. This is not enough I gather.

Brigadier Reynolds: Yes. In my experience they require proof that the spouse is alive.

Mr. Justice Woods: Supposing you applied for a court order and it was refused; this would not help you really, would it?

Brigadier Reynolds: It might be of some assistance.

Mr. Justice Woods: Wouldn't it simply show that the court was not satisfied that the person was dead? This is all it would show.

Brigadier Reynolds: This is all it would do.

Mr. Justice Woods: It would not show that the person was alive; it would just show that you had not proved them dead.

Brigadier Reynolds: That is correct.

Canadian Pension Commission: Mr. T.D. Anderson, Commission Chairman, in his submission to your Committee under date of March 21st, 1966, provided an explanation of Commission policy in regard to Section 34(5) and (6) as follows:

This section was only recently introduced into the Act and it was designed to make it possible for the Commission to pay pension at married rates and to widows in cases where the couple, although unable to legalize their union because of a previous undissolved marriage, nevertheless, lived together for many years as man and wife, are responsible and reputable members of society and may have raised a reputable

Representations and Evidence

family. There are two requirements which leave the Commission no discretion.

1. They must be prohibited from celebrating a marriage because of a previous undissolved marriage.
2. They must have lived together as man and wife continuously for seven years or more.

Surely the Legion does not suggest that we may disregard either of these two specific requirements. Either there is an undissolved marriage or there is not, and surely the applicant must demonstrate that there is, before we may authorize pension at married rates in such cases.

Furthermore, if and when the bar has been removed, it is surely no part of the Commission's responsibility to encourage continuation of the illicit relationship for which there is no longer any valid reason. These firm provisions are contained in the Act for the very purpose of discouraging people from either entering or continuing such relationship, when both the man and the woman are free to enter into a legal marriage. This is all the Commission is attempting to do.

HISTORY

A provision for an allowance on behalf of a wife residing with a veteran in an irregular union was made in the War Veterans Allowance Act in 1955. The wording of this provision is exactly the same as that used in Section 34(5) of the Pension Act. Presumably the Pension Act provision was copied *from the War Veterans Allowance Act.

Section 30(11) (b) of the War Veterans Allowance Act reads as follows:

For the purposes of this Act, a veteran who;

- (i) is residing with a woman with whom he is prohibited from celebrating a marriage by reason of a previous marriage either of such woman or of himself with another person, and
- (ii) shows to the satisfaction of the District Authority that he has, for seven years or more, continuously maintained and publicly represented such woman as his wife,
- (iii) shall be deemed to be married to that woman, and upon the death of the veteran at any time while so deemed married, such woman shall be deemed to be his widow.

The adoption of this provision for recipients of War Veterans Allowance resulted in a request to the Government for similar legislation in the Pension Act. This was enacted on the date of March 9th, 1961, and read as follows:

34(5) For the purposes of this Act, a veteran who:

- (a) is residing with a woman with whom he is prohibited from celebrating a marriage by reason of a previous marriage either of such woman or of himself with another person, and
- (b) shows to the satisfaction of the Commission that he has for seven years or more, continuously maintained and publicly represented such woman as his wife, shall where the Commission in its discretion so directs, be deemed to be married to that woman, and upon the death of the veteran at any time while so deemed to be married, such woman shall, where the Commission in its discretion so directs, be deemed to be his widow.

* This assumption is arrived at by your Committee because the relevant section in the Pension Act follows the exact wording of that in the War Veterans Allowance Act, except that in the former, the Commission is given a discretion which does not appear in the latter.

History

Section 34(6) of the Act makes provision for a woman who was residing with a pensioner to be deemed his widow for purpose of the Pension Act under certain specified circumstances. This section reads as follows:

34(6) For the purposes of this Act, a woman who;

- (a) was residing with a veteran immediately prior to his death and was prohibited from celebrating a marriage with him by reason of a previous marriage either of such veteran or of herself with another person, and
- (b) shows to the satisfaction of the Commission that she was, for seven years or more, continuously maintained and publicly represented by such veteran as his wife.

shall, where the Commission in its discretion so directs, be deemed to be the widow of that deceased veteran.

The annotation explaining the purpose of this legislation was as follows: ¹⁴

This subsection is new, and its purpose is to permit the Commission, where the Commission is satisfied as to the existence of certain facts, to deem a veteran to be married for the purpose of increasing his pension from the single rate to the married rate. The Commission may also upon the death of a veteran deemed to be married to a woman, deem the woman to be his widow for the purpose of paying her widow's pension.

A similar provision is contained the the War Veterans Allowance Act.

COMMITTEE RECOMMENDATIONS

(113)

That the Act be amended to provide that in an application under Section 34(5) or Section 34(6) the following practice be adopted:

Refusal to When
Pensioner and
Wife Are
Separated

(a) It should ~~not~~ be necessary for the Commission to locate or contact the spouse involved in the first marriage.

Missing Spouse
Need Not be
Contacted

(b) A pensioner should be required only to produce a certificate or other satisfactory evidence of the previous marriage that constitutes the bar to marriage and show to the satisfaction of the Commission, by statutory declaration, that no evidence of the termination of such marriage by death, divorce or annulment has been found upon reasonably extensive enquiry.

Evidence to
Substantiate
Irregular
Union

(c) The Commission should accept the refusal by any person competent to issue a marriage licence as acceptable proof of the existence of a bar to marriage for the purposes of Section 34(5).

Refusal to
Issue Marriage
Licence is
Acceptable
Proof

(114)

That the existing requirement under Commission policy for a review every three years of cases where additional pension is paid under Section 34(5) be discontinued.

Periodic
Review Not
Necessary

(115)

That the staff of the Canadian Pension Commission and the Department of Veterans Affairs be authorized to counsel persons who may be able to qualify for benefits under Sections 34(5) and 34(6) of the Act, to assist them in the completion of an application, where appropriate.

DVA and CPC
Staff to
Advise
Potential
Beneficiaries

COMMENTS

Contact with the missing spouse

The Act provides that a pension may be paid to a pensioner at married rates on behalf of a woman with whom he is living in an irregular union, provided he is prohibited from celebrating a marriage by reason of a previous marriage. This is a discretionary benefit under the Act and the Commission must necessarily make an investigation to determine that the pensioner is prohibited from marrying the woman whom he is maintaining and publicly representing as his wife. There is no requirement in the Act, however, for the Commission to contact the missing spouse, whether the legal wife of the pensioner or the legal husband of the pensioner's irregular union wife.

A requirement of this nature seems unnecessary. Your Committee agrees with the suggestion, implied in the Commission Chairman's letter to the Chief Pensions Advocate of January 24, 1963, that the Pension Commission could not disregard the views of the legislators to the effect that pension at married rates should not be paid where an irregular union exists if it is possible for the couple concerned to be legally married. The requirement of the Commission, in determining the existence of a bar to marriage, to locate and question the missing spouse in order to determine that she or he is still alive, or that the marriage has not been dissolved or annulled, is not so readily apparent.

This procedure must, in many instances, be fraught with complications. For example, a legal wife may have separated from a pensioner

COMMENT

many years ago, and may, for reasons of her own, have refused to seek divorce. She may be living in a domestic relationship with a new husband, and there may be children who have no knowledge of the previous marriage. It would seem to your Committee that any requirement to contact this wife to determine whether she is still alive, or whether she has subsequently divorced the pensioner, is an invasion of her privacy, which should be neither condoned nor required. A similar circumstance could apply to the husband of the irregular union wife of a pensioner. He may see no reason to co-operate with the representatives of the Commission who require him to prove that he is alive and that he has not divorced his wife. Your Committee sees no just reason why this type of information should have to be obtained to substantiate an application under this section of the Act.

Statutory Declaration

In the administration of the War Veterans Allowance Act, a statutory declaration is required from the veteran to the effect that he has carried out reasonably extensive inquiry, and that the marriage which prohibits him from regularising his irregular union has not been terminated by death, divorce or annulment. The relevant instruction is set out in Department of Veterans Affairs Departmental Instructions as follows: 15

28. In dealing with cases under Section 30(11)(b) of the Act, the veteran must produce a certificate or other satisfactory evidence of the marriage that constitutes the bar to marriage with the woman with whom he cohabits. He must further show to the satisfaction of the VADA by statutory declaration that no evidence of the termination of such marriage

COMMENT

by death, divorce or annulment, has been found upon reasonably extensive enquiry. Finally, he must tender such evidence as will convince VADA that he has maintained that woman continuously for at least seven years, that he is still maintaining her to the best of his means and that he has continuously over the same period represented her as his wife. Similar proof is required from the widow in Section 2(3) cases.

This seems to be a reasonable procedure and your Committee recommends its adoption for purposes of the Pension Act.

Inability to obtain a marriage licence

A considerable number of irregular unions must necessarily continue because the bar to marriage rests on the fact that the couple are unable to obtain a marriage licence. If an issuer has refused to grant a licence on the grounds of a previous marriage this should be acceptable to the Commission as sufficient proof that a bar to marriage exists. The official procedure for an application for a marriage licence requires a declaration as to the marital status of the intended parties to the marriage. If the properly constituted authority has refused to issue a marriage licence, this refusal should be sufficient grounds to establish a bar to marriage in the absence of other circumstances casting doubt upon it.

Periodic Review

Your Committee notes that this Section of the Act makes no provision for a periodic review. However, by its own policy, the Commission has decided that a review of circumstances, where pension is granted under Sections 34(5), is required every three years to determine that a bar to marriage still exists. This review normally requires a representative of the Commission to contact the missing spouse. This, your Committee feels, could lead to a further aggravation of the situation as explained in regard to the initial requirement for such contact.

COMMENT

It should be sufficient, for the purpose of establishing that the bar to marriage remains, for the Commission to obtain a statutory declaration from the pensioner. If the Commission determines, at some later date, that the bar to marriage was removed, and the pensioner had not taken the steps to legalize his irregular union, any overpayment could be recovered from pension as in the case of other overpayments.

Counselling of Potential Recipients

Your Committee noted the policy of the Commission to the effect that applications under Section 34 (5) and Section 34(6) would not be "invited" where a welfare officer of the Department of Veterans Affairs, acting as a representative of the Commission, was aware that the circumstances of the pensioner or other person might be such as to permit an award of pension. There is no justification for the continuation of this practice, in the opinion of your Committee.

The Act states that, so long as a pensioner can show to the satisfaction of the Commission that he has maintained a relationship with another woman for seven years, publicly representing her as his wife, and he is prohibited from celebrating a marriage with her by reason of a previous marriage of either the woman or himself, the Commission has discretion to pay pension at married rates. The legislation provides, also, that a widow who immediately prior to the death of a pensioner was residing with him under these circumstances, may be deemed to be the widow of the pensioner for the purposes of the Pension Act. Although the legislation is discretionary, it is the view of your Committee that the Commission should take all reasonable means to ensure that the availability of these provisions of the Act is known.

COMMENT

Accordingly, the Commission should instruct those acting as its representatives to assist any person to make an application in circumstances where he or she might qualify for benefit under these Sections of the Act.

In this respect, your Committee noted the policy of the War Veterans Allowance Board, which is as follows: ¹⁶

Irregular Unions (Sections 2(3) and 30(11)(b) WVA Act)

19. Pursuant to Sections 2(3) and 30(11)(b) WVA Act, applicants who may be affected should be counselled concerning their rights and privileges under the Act.
20. Utmost discretion should be used in dealing with these cases as there may be some instances where the wife may not be aware of the true situation, particularly where a marriage has taken place but is not recognized as valid by VADA, (Veterans Affairs District Authority) or the Board, and where the lesser amount of allowance in payment may have been explained to his "wife" by the veteran on grounds other than irregularity of marriage.
21. The veteran should be advised that if his "wife" is employed, her earnings would have to be taken into account in computing income in the event of his being "deemed to be married" and her assets would also be taken into consideration in determining financial qualifications for an award.
22. (1) A veteran, not necessarily a recipient, who seeks to secure the benefit provided by Section 30(11)(b) of the Act shall apply in writing to VADA (Veterans Affairs District Authority) and must meet the following essential conditions:
 - (a) be residing with a woman to whom he is not legally married, and whom he cannot marry because of a previous marriage, and
 - (b) produce evidence that he has continuously maintained and represented that woman as his wife for seven years or more.

War Veterans Allowance policy re bar to marriage

The requirements under the War Veterans Allowance Act for determining whether a bar to marriage exists appear considerably less restrictive than those set down by the Canadian Pension Commission.

COMMENT

The War Veterans Allowance Board requirements are set out as follows:¹⁷

In dealing with cases under Section 30(11)(b) of the Act, the veteran must produce a certificate or other satisfactory evidence of the marriage that constitutes the bar to marriage with the woman with whom he cohabits. He must further show to the satisfaction of the VADA by statutory declaration that no evidence of the termination of such marriage by death, divorce or annulment has been found upon reasonably extensive enquiry. Finally, he must tender such evidence as will convince VADA that he has maintained that woman continuously for at least seven years, that he is still maintaining her to the best of his means and that he has continuously over the same period represented her as his wife. Similar proof is required from the widow in Section 2(3) cases.

While it is appreciated that an award of War Veterans Allowance differs greatly from that of pension, it does not seem realistic that the administration of the War Veterans Allowance Act should call for one type of proof while the Pension Commission requires another. Consider the following hypothetical case: A 10% disability pensioner, who is also a War Veterans Allowance recipient, has lived with a woman in irregular union for seven years. He applies for married rate of the Allowance and is required to supply a copy of the marriage certificate which constitutes the bar to marriage and to complete a statutory declaration giving the details of his relationship with said woman. The woman concerned is required also to complete a similar declaration. On approval of his application his Allowance is increased from the single rate of \$105 to the married rate of \$170 per month.

As he is entitled under the War Veterans Allowance Act to a monthly maximum permissible income of \$245 he then applies to the

COMMENT

Pension Commission under the provisions of Section 34 (5) for additional pension on behalf of his irregular union wife. In addition to completing declarations similar to those for War Veterans Allowance the pensioner must also submit proof that the bar to marriage still exists. The production of the marriage certificate is insufficient proof for this purpose. If he is unable to produce such proof then his application fails and he is not entitled to the additional \$6.40 that the married rate under Schedule "A" of the Pension Act would bring.

It should be noted that the provision for War Veterans Allowance at married rates in an irregular union has been in force since 1955. A similar provision came into effect under the Pension Act only in 1961. The procedure in use under the War Veterans Allowance Act seems to have worked well. It has been accepted by the Auditor-General and by the Government as satisfactory, and should be regarded as a reasonable precedent. Accordingly, your Committee has suggested that the requirements of the Canadian Pension Commission in regard to the administration of this provision of the Pension Act should be similar to those of the War Veterans Allowance Board.

IRREGULAR UNIONReferences

1. Canadian Pension Commission subject file on Section 34(5)(6) letter dated February 19th, 1965, by A.L. Fortey, Commission Secretary.
2. Canadian Pension Commission subject file on Section 34(5)(6), letter dated November 2nd, 1964 by A.A. Fillman, Claims and Review Branch.
3. Minutes, General Meeting, Canadian Pension Commission, April 21st, 1965.
4. Canadian Pension Commission subject file on Section 34(5)(6) Canadian Pension Commission memorandum dated March 20th, 1961.
5. Canadian Pension Commission subject file on Section 34(5)(6) copy of memorandum, dated June 27th, 1961, from Chief, Special Services Division, Veterans Welfare Services, Department of Veterans Affairs to District Superintendent, Welfare Services, Winnipeg.
6. Canadian Pension Commission subject file on Section 34(5)(6) Canadian Pension Commission memorandum dated March 20th, 1961.
7. Proceedings of Committee Sessions, Volume III, page L-154
8. Ibid, Volume VI, page KK-54
9. Ibid, Volume VI, page KK-55
10. Ibid, Volume VI, page KK-57
11. Ibid, Volume VI, page KK-58
12. Ibid, Volume IV, page R-55
13. SC 1961, C.10, S.5 assented to March 9th, 1961.
14. Bill C-67, as passed by the House of Commons, March 1st, 1961 page 6.
15. Department of Veterans Affairs, Departmental Instructions, Volume VI, Chapter IV, page 6, Section 28
16. Ibid, Volume VI, Chapt. IV, pages 4 and 5, Sections 19,20,21 and 22.
17. Ibid, Volume VI, Chapt. IV, page 6, Section 28

CHAPTER 30RETROACTIVE AWARDSGENERAL

This term has been used for many years to describe the process under which the Pension Commission may, in its discretion, grant retroactive pension from a date prior to the actual date upon which decision to make the award is approved.

The relevant sections* of the Pension Act are as follows:¹

- * 31(1)(b) When entitlement to pension is granted by the Commission, or by an Appeal Board thereof, upon a date twelve months or more after the date upon which application therefor was made to the Commission, from the date of grant, or, in the discretion of the Commission, from a date twelve months prior to the date of grant.
- 31(2) Notwithstanding any limitation contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional six months' pension in cases where it is apparent that hardship and distress might otherwise ensue. 1939, c.32, s.11; 1946, c.62, s.13.
- 31(3) Notwithstanding any limitations contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records, or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue.
- * 42(2) Notwithstanding any limitation contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional six months' pension, where it is apparent that hardship and distress might otherwise ensue; but no payments may be made under this section in respect of any member of the forces who has died, for any period prior to the date of death, or for any period in excess of eighteen months prior to the date on which pension is finally awarded, except as otherwise provided in subsection (3). 1939, c.32, s.13; 1946, c.62, s.24.
- 42(3) Notwithstanding limitations contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue; but no such payment may be made in respect of any member of the forces who has died for any period prior to the date of death.

* Section 31 applies to claims arising from disability; Section 42 applies to claims arising from death.

General

The following policy decisions of the Commission govern the extension of retroactive pension under Sections 31 and 42:

Applicable to Entitlement Only: The following ruling was confirmed at a general meeting of the Commission April 9th, 1947:

Only those decisions of the Commission or an Appeal Board of the Commission granting "entitlement to pension" are subject to Section 31 of the Pension Act.

A similar ruling was made in respect of Section 42, concerning retroactivation in regard to entitlement decisions arising from death. These restrictions are contained in the Pension Act, in that Sections 31 and 42 refer only to entitlement. Accordingly, retroactive pension is not awarded under existing legislation in regard to increases in the degree of aggravation or in the degree of assessment.

Assessable Degree of Disability: Where a retroactive award of pension is granted, Commission policy provides that an assessable degree of disability must have existed for the total period of retroactivation. The following rulings of the Commission apply:³

When entitlement is granted less than 12 months from the date of application the effective date is governed by 1(a) of 31 and the following policy is to be followed:

- (1) When the disability is shown to have existed at discharge and an assessable degree of disability was shown to have existed at that time, pension will be awarded from the date of discharge.
- (2) When a disability of non-assessable degree is shown to have existed at discharge, entitlement may be conceded effective date of application, (that of discharge) but pension may only be paid from the date on which an assessable degree of disability became apparent.

When entitlement is granted for more than 12 months from the date of application, the effective date is governed by (1)(b) of 31 and the following policy is to be followed:

General

- (1) When the disability is shown to exist at discharge and there is an assessable degree of disability at that time, pension will be awarded for 12 months prior to date of decision.
- (2) When a disability of non-assessable degree is shown to exist at discharge, entitlement may be conceded effective date of application (that of discharge), but pension may only be paid on the date an assessable degree of disability became apparent, provided such does not exceed 12 months.
- (3) When the disability for which application is made, was not shown to exist at discharge, pension, when entitlement has been conceded will be:
 - (a) from the date of grant (the decision)
 - (b) from a date 12 months prior to date upon which decision was rendered - this is discretionary and is dependent on evidence of an assessable degree of disability over that period.

Six Months Retroactive Pension for Hardship and Distress: The policy of the Commission in this respect is set out as follows: ¹²

After the basic effective date of the award of entitlement to pension has been made under (1)(a) or (b) the Commission may make an additional award of not more than six months pension under (2) of 31, where it is apparent that hardship and distress may otherwise ensue. However, awards under (2) are not to be made automatically; claims will be considered only where there is evidence before the Commission in respect to the possibility of hardships and distress ensuing if an award is not made.

Subject to the above-stated policy, an award under (2) may be made as follows:

- (1) When the disability is shown to exist at discharge, and there is an assessable degree of disability at that time, an additional award not exceeding six months may be granted in addition to the 12 months under Section 31(1)(b).
- (2) When a disability of non-assessable degree is shown to exist at discharge, entitlement may be conceded effective date of application (that of discharge), but the additional award of pension not exceeding six months may only be granted in addition to the 12 months under Section 31 (1)(b) when an assessable degree of disability is shown to exist over that period.

General

- (3) When the disability for which application is made is not shown to have existed at discharge, and entitlement has subsequently been awarded, the discretionary award, not exceeding six months, will not be authorized unless medical reports on record show that the pertinent disability was of an assessable degree over that period.
- (4) There must always be evidence that "hardship and distress" might ensue if the application is not granted. If this evidence is not on file, the applicant is to be awarded an opportunity to produce such evidence by interview arranged by the Pension Medical Examiner (District Office).

Eighteen Months Retroactive Pension due to Administrative Difficulty: The

policy of the Commission in respect to the award of an additional 18 months retroactivation is set out hereunder: ⁵

After the basic effective date of the award of entitlement to pension has been made under (1)(a) or (b) the Commission may make an additional award of not more than 18 months pension under (3) of 31, where, through delays in receiving service or other records, or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue.

An award under (3) will not be made unless;

- (1) The basic effective date of the award of entitlement to pensions has been firmly made under (1)(a) or (b), and
- (2) An assessable disability is shown to have existed during the period covered by the award.

Thirty-six Month Limitation: The policy of the Commission concerning the maximum period of retroactivation is as follows: ⁶

Section 31 of the Pension Act prohibits the Commission from making an award of pension retroactive for a longer period of time than the statutory 36 months provided by Section 31.

Aggravation Award Amended to Full Entitlement: The policy of the Commission in respect to retroactivation, in cases where full entitlement is granted following a previous award which was given on a partial aggravation basis only, is as follows: ⁷

General

In those cases where full entitlement has been limited by the provisions of Section 13(1)(c) and where by a renewal decision the above-noted limitations are removed and pension is payable for the entire disability, the effective date for new entitlement would be subject to the provisions of Section 31 (date of application or twelve months).

Date of application: The date of application is of particular importance in regard to retroactive awards, as such is used in determining the date upon which retroactivation may commence. The effective date of application for purposes of the Pension Act is laid down by the Commission as follows: ⁸

That for pension purposes, date of application will include the following:

1. (a) Date of discharge or retirement of a member of the forces in whom a disability is shown to exist at that time.
- (b) Date of discharge from Departmental treatment with evidence of disability when the member of the forces on discharge or retirement was passed directly to D.V.A. for treatment. (ii (i) (e))

NOTE: A disease or injury mentioned on discharge board proceedings is not an application for pension if causing no disability.

A disability of non-assessable degree recorded on discharge from the forces will constitute an application within the meaning of the Act.

2. The date a letter of application is received at Head Office, or in the District Office, or by the Veterans' Bureau.
3. The date an applicant or person on behalf of an applicant appears in person at Head Office, in the District Office, or the Veterans' Bureau..
4. The date an ex-member of the forces makes application for treatment to the Department of Veterans Affairs, or the date of recorded evidence of disease or injury on Departmental treatment documentation; i.e., an application for War Veterans' Allowance is not accepted as an application for pension.

General

5. Hospital, Private Physician (regularly qualified, duly licensed and in good standing), or other Medical Authority, files of the Department of Veterans Affairs, Compensation Board or Insurance Company records, where such records describe the disease or injury or symptoms thereof for which pension entitlement has been granted; provided, however, that such records have been duly verified to the satisfaction of the Commission.

REPRESENTATIONS AND EVIDENCE

In general terms, those making representations to your Committee expressed the opinion that the Pension Commission did not make sufficient use of its discretion in regard to the provisions of the Act under which awards could be made on a retroactive basis.

War Pensioners of Canada (Toronto Branch): The following recommendation was made in a prepared brief:⁹

Resolved that, until changes are made, a more liberal use of the retroactive powers of the Commission should be made when it appears that the veteran has been made to suffer through no fault of his own.

Toronto and District Ex-Servicemens' Advisory Committee: This organization referred to the sections of the Act dealing with retroactivation and commented as follows:¹⁰

It has been noted that even though pension may not be awarded sometimes up to a period of two years following the application for claim, very rarely is this Section of the Act used as we believe it should be.

Mr. James Leslie Varley, Chairman of the Advisory Committee, stated that his group objected particularly to the provision under which an additional six months retroactivation was granted "where it is apparent that hardship and distress might otherwise ensue".¹¹ Mr. Varley stated:¹²

I believe the intent is that if it has been found, prior to his having been awarded this grant, that he has been out-of-pocket or beggared himself by virtue of his illness then this may be awarded, not as a means test, but as a repayment for monies expended which should have initially been paid by the Commission.

Mr. Varley stated that his delegation was satisfied with three years total retroactivation, provided the Commission awarded this retroactivation on a liberal basis.

Representations and Evidence

Army, Navy and Air Force Veterans: In a prepared brief this organization made the following recommendation:¹³

Retroactivation Awards

That all War Disability Compensation when granted become effective from the date of the application.

Comment: We recommend that when a decision is given favourable to the veteran, War Disability Compensation be paid as of date of application. Section 31 (i) of the Canadian Pension Act leaves the decision to the discretion of the Canadian Pension Commission up to a maximum of 12 months. Section 31(2) permits an additional 6 months when hardship and distress would otherwise occur, and Section 31(3) permits an additional 18 months compensation where there are administrative delays beyond the applicant's control.

It is appreciated that for a number of years following World War I, compensation when granted became retroactive to the appearance of the disability or in some instances the date of discharge, resulting in large retroactive payments. To correct this situation an injustice was permitted in order to secure a more unbiased consideration of the merits of the applicant's claim without being unduly influenced by the financial consequence of a favourable decision.

Experience has shown that there have been many cases of delay beyond the applicant's control, which under the present regulations have resulted in both injustice and hardship. To offset any excessive awards which go back to World War I and which might jeopardize a favourable decision on behalf of the applicant a provision could be inserted in the Canadian Pension Act that the retroactive provisions would not apply to claims made prior to a specific date.

Present regulations do not safeguard applications of obvious injustice, where through error, neglect, or other causes, utterly beyond the control of the applicant, pension is unduly delayed.

Mr. J.C. Lundberg, the Dominion Pro

Act be amended to provide a limit of _____ from the date of an award for _____.

The War Amputations of Canada: This Association stated in a prepared brief as follows:¹⁴

Representations and Evidence

The Pension Act, Section 31, Subsection 1(a) 2 and 3 and Section 42, Subsection 1(a) and 2 provide for retroactive pension awards of 12 months, plus an additional six months for hardship and distress and 18 months for administrative delays, etc.

It has been the experience of the War Amputations of Canada that the Canadian Pension Commission applies a rather limited interpretation to the retroactivation clauses of the legislation. This seems particularly apparent in regard to the hardship clause which provides for an additional six months and the administrative delays clause which provides for an additional 18 months.

It would seem that the responsibility to apply for retroactivation is that of the applicant. He can be presumed to be at a disadvantage in this respect, however, inasmuch as he is not aware of the explicit requirements of the legislation.

It would perhaps be feasible to suggest that the Commission should accept some responsibility to determine whether or not the "hardship" and/or "administrative difficulties" conditions would qualify the applicant for retroactive pension. This could be done by a procedure under which the Commission would require the Pension Medical Examiner, Veterans' Bureau, or the Commission's Appeals or Claims Branches to furnish a certificate in all cases to the effect that, so far as can be ascertained from the records,

- (a) No hardship or distress is apparent which would qualify the applicant for additional retroactivation and/or
- (b) There is no evidence of administrative difficulties beyond the applicant's control which would qualify the applicant for additional pension in this respect.

In commenting on the recommendation, the representatives of the Association suggested that an applicant may not be aware that the Act made provision for retroactivation, and proposed that a form be used to call this to his attention. The following discussion took place: ¹⁵

Representations and Evidence

Mr. Justice Woods: Well, as the matter stands now if an applicant is given a pension, that is assuming he applies, and after some delay a pension comes through, the matter is not taken to appeal, would there be anything apart from his own knowledge of the Act which he might or might not actually have to acquaint him with the fact that there is provision here for an additional award?

I gather there isn't because you are suggesting here that there be some kind of onus on the Commission to change this, or apprise him of it to let him know if his circumstances are within certain areas he can apply. Not assuring him he can get it, of course.

Mr. Bell; Honorary Sec.-Treas: That is correct.

Mr. Justice Woods: Well, presumably, I speak with no knowledge of the procedural details that are gone through I have seen these; presumably then if there was a form of some sort or a place for him to fill in, a form was sent to him or something else, when the award was made, asking him certain questions, this might do it, might it not, call it to his attention?.....As it stands now, while legally he is presumed to know the law, yet in actual fact he may not know that there is such a thing (retroactivation).

Mr. S.J. Alderdice; Executive Member: That is correct.

Mr. Justice Woods: So his need would be to get this knowledge to him?

Mr. K. Butler, Vice-President: It would be very helpful, sir.

Royal Canadian Legion: In a prepared brief, this organization stated: ¹⁶

Because of the length of these sections, we do not propose to quote them as has been the practice in dealing with other sections of the legislation. We have previously pointed out that proper application of Section 70 of the Act will significantly reduce the need for implementation of the maximum provisions of Sections 31 and 42. We have also stated that generally in entitlement claims, the Commission grants retroactivation of twelve months. There are, however, very few instances in which the Commission invokes its discretionary powers to grant the additional retroactivation provided under subsections (2) and (3). We have for several years been making representations to the Government requesting an amendment to the legislation to provide that when entitlement is granted, pension will be paid from the date of application, except that no instance shall be paid prior to 1.1.46.

Representations and Evidence

For a number of years after World War I, pensions were retroactive to the date of the appearance of the disability or sometimes the date of discharge. As a result, some awards involved large retroactive payments and it was argued that this fact made the Commission extremely reluctant to grant the application. To do away with this psychological barrier an injustice was permitted in order to secure unbiased consideration of the merits of the applicant's claim without being unduly influenced by the financial consequences of a favourable decision.

There are many cases which, by their very nature, lend themselves to delay. There are cases that are difficult to establish yet are inherently just and are eventually allowed. Whether the case is easy or difficult to establish, if it is just, the rights of the applicant are the same, and the obligation of the country is the same; it is obviously not fair that the applicant should be so heavily penalized because of the difficulty of establishing his right to entitlement.

We have cited many cases in which applicants have been deprived of pension for months and years because of the Commission's failure to invoke the provisions of Section 70. For instance, Mrs. L. (see page 32)* lost \$20,000 and Mr. H. (page 32)* was deprived of \$8,000. Even if the Pension Commission were in all instances to invoke the maximum provisions of Sections 31 and 42, there would still be considerable losses to applicants and a resultant saving to the State. The Commission, however, in its narrow approach, does not give a generous interpretation to the provisions of subsections (2) and (3). Delays in adjudication arise for many different reasons but regardless of the cause, the Legion believes that the applicant should not suffer a loss which can be overcome by the implementation of those subsections. In recent months we have had discussions with the Chairman of the Pension Commission regarding some of these delays on Appeal Board decisions, when the Commission has on its own initiative, sought medical opinions which have enabled Boards to rule favourably. We suggest that such delays are of an administrative nature and while we compliment the Commission on obtaining the additional evidence, we feel it should be mandatory that awards be effective three years (under the present legislation) prior to the date of decision where application has been made before this date.

We do not propose to burden you with further cases in support of this recommendation, since we believe there are a sufficient number of claims already before you to justify this point.

* These page numbers refer to pages in the April 1941 Commission Report.

Representations and Evidence

Mr. Donald. M. Thompson, Dominion Secretary of the Legion, suggested that it would be helpful if the Commission were to "use the Sections that are there to their maximum",¹⁷ but suggested that an amendment to the legislation was required and reiterated the proposal in the brief, that:

When entitlement is granted, pension will be paid from the date of application, except that in no instance shall awards be paid prior to January 1st, 1946.

In explanation of the date, Mr. Thompson stated:¹⁸

This date was selected a number of years ago by the Legion in an effort to be reasonable and to suggest a date beyond which retroactivation would not go. It was purely an arbitrarily selected date.

The Legion suggested also that the Commission's policy in regard to retroactivation concerning increases in degree of aggravation, and the degree of assessment, was too restrictive. The Legion's brief stated:¹⁹

The legislation provides that when a man receives entitlement it shall be effective from a date not more than twelve months prior to the ruling, the date of the ruling, or from an intermediate date. In practice, the Commission nearly always makes such awards effective twelve months prior to the date of decision. This includes awards of both full and fractional entitlement. When a pensioner holding fractional entitlement is subsequently granted full entitlement, it also is effective twelve months prior to the date of decision. In those instances, however, when entitlement is increased only on a fractional basis (i.e. one-fifth to two-fifths) the award is effective only from the date of decision. We have suggested to the Commission that such awards should be on the same basis as others and effective twelve months prior to the date of decision. We have also referred to the fact that increase in assessment of pension is effective from "date of complaint", but the Commission does not follow this practice when increasing fractional assessments - a further instance of the Commission refusing to implement the provisions of Section 70.

Representations and Evidence

Mr. Jack MacIntosh, M.P.: Mr. MacIntosh suggested that an award should be retroactive to the date of the original application, regardless of the amount of time involved.

L'Association du 22ième Inc.: This Association, in a prepared brief recommended as follows:²⁰

Recommendation 8: Retroactive Provisions: The Pension Act, Section 31, subsections 1,2,3, and Section 42, subsections 1,2,3, make provision that when a pension is granted, the Commission may approve a retroactive award as follows:

1. Twelve months from the date of approval, or lesser if the application was submitted within a lesser period;
2. An additional six months if financial hardship involved;
3. An additional eighteen months if there was some administrative delay in handling the case.

Our membership indicated that, in only a few cases, does the Commission actually go back beyond the twelve month period, and there is a great deal of confusion as to the conditions which are required to qualify for an additional six months for financial hardship, and/or an additional eighteen months for administrative delay.

Our membership also considers that, where a man has applied for pension several years ago and the application is eventually granted, that man should be entitled to a retroactive award of at least five years, provided that the delay in granting pension was no fault of his own.

In explanation of the proposal that retroactivation should be limited to five years, Major Paul Clavel, Secretary of the Association, stated:²¹

There are some reasons...let us say he has waited 20 years, there are some reasons for this delay of 20 years. Now, this delay can, in some measures, be blamed on the man himself, in some measure; and in some measure to the delay in finding documents, et cetera, but the man has managed to live up to the time that he asked for this pension. But he could get some indemnity for this delay, and we think that five (5) years is a reasonable delay.

Representations and Evidence

Canadian Pension Commission: Mr. T.D. Anderson, Chairman of the Commission, stated in a prepared brief:²²

The Legion never sees those claims we grant retro-active payments under Sections 31 and 42. They only get complaints when we do not grant such awards. So, again, they assume that we never grant them unless they press us to do so. This is true of most claims with which the Legion deals. Veteran only goes to the Legion when he is unable to establish his claim through regular channels. Most legitimate claims, of course, are granted as a result of procedure through regular channels.

Mr. Anderson gave information, in regard to an interpretation of "hardship and distress" in Sections 31(2) and 42(2), in discussion before the Committee, as follows:²³

Mr. Anderson: Well I don't know that there is a fixed yardstick, and I don't think that you could make a fixed yardstick. I think what might be a hardship for one person wouldn't necessarily be a hardship to another.

Mr. Justice Woods: Would this mean where he had suffered as a result of not having a pension, or would it be that his circumstances financially were bad?

Mr. Anderson: Bad financial circumstances, as you say, you have got to know whether he suffered because of not having money over this specific period.

But, in any case, the point I am getting at is that you can't just use discretion without anything else; you have to question whether or not the man has suffered hardship and distress.

Mr. Anderson stated that, in some instances, the Commission granted retroactivation on its initiative and in other cases only if the pensioner made application for it.

Mr. H.W. Herridge, M.P.: In regard to retroactivation, Mr. Herridge suggests that:²⁴

Representations and Evidence

I am one who believes that if it is proven that a man has been done an injustice, he should be compensated accordingly. That is, it should be retroactive from the time when the disability was incurred.

He stated further that he appreciated what he called "the psychological effect" that such an award would have on the Commission's thinking if it were required to grant retroactivation going back many years. He stated, therefore, that he would support a limitation of five years for retroactivation which, in his opinion would be "an improvement on the present legislation".²⁵

Mr. Jack Bigg, M.P.: In a prepared brief, Mr. Bigg stated as follows: ²⁶

Retroactive Awards - Section 31 (for disabilities) and Section 42 (for deaths) contain the retroactive provisions; generally speaking those are:

- (a) Twelve months in normal circumstances if the application pre-dated that time.
- (b) An additional six months if hardship is evident; and
- (c) An additional eighteen months where there has been administrative delay.

It is desired to comment, here again, that the decisions in cases of this nature must necessarily be made on a discretionary basis by the Commission as it would be impossible to set down specific instructions in the Act. Some provisions should be made, however, for an appeal from arbitrary decisions of the Commission where a claimant for pension considered that he is entitled to a greater period of retroactivation than the Commission is prepared to award.

In explanation, Mr. Bigg stated: ²⁷

The Commission feels that they should not give this unless there are extraordinary circumstances. It should be generously interpreted and you should give him the back pension, whenever it is possible, for his out-of-pocket. Apparently at the present time he does not get this opportunity to come back and ask for that pension.

Representations and Evidence

Mr. Rene Emard, M.P.: Mr. Emard recommended, in a prepared brief:¹⁶

Retroactive Awards -

It is my understanding that under Sections 31 and 42 of the Pension Act it is possible for the Commission to make an award retroactive no more than three years - and even then, in order to obtain a retroactive award beyond one year the applicant has to prove financial hardship or that there was administrative delay beyond his own control. I can readily see that, where an application is made for pension fifteen or twenty years previously and eventually the application is granted, it would not be reasonable, in most circumstances to grant arrears of pension for these fifteen or twenty years. At the same time, I do feel that the existing provisions are too restrictive. In my opinion, a maximum of five years retroactivity would be fair to all concerned.

Veterans' Bureau: In answer to a written question submitted by your Committee as to whether the Veterans' Bureau included the possibility of retroactivation in submitting a case to the Commission, Brigadier P.E. Reynolds, Chief Pensions Advocate, stated in a prepared brief:²⁹

In cases in which there has been delay in making the original submission and in cases of obvious hardship, the advocates may include a request for consideration under Section 31. It is more common, however, for the advocate to make such a request after pension entitlement has been conceded by the Commission. That is, it is felt that the chances of success are better if the issues are submitted separately.

In a reply to a prepared question from your Committee as to whether it would be feasible for the Veterans' Bureau to make application on behalf of the applicant for retroactivation, Brigadier Reynolds stated:³⁰

The applicant is usually advised with reference to Section 31 at some stage of the proceedings. The advocate generally expects the applicant to instruct him to make a submission under Section 31.

In regard to the practice under which the Veterans' Bureau waited for instructions from the applicant, Brigadier Reynolds stated:³¹

Representatives and Evidence

...The reason we wait for instructions is because the hardship and delay provision calls for an investigation by the Commission of the means test variety, and we feel that some applicants would object to having people looking into their affairs, and we want their consent and their knowledge of what will happen before this takes place.....

The Advocate hesitates to make application without instructions because the "means test" type of investigation on the part of Commission officials might be a source of embarrassment to some veterans..

Your Committee asked the Veterans' Bureau to comment on the following question: ³²

Representation has been made to us that the period of retroactivation should perhaps be extended to five years. Could you tell us the reaction of what might be termed the average applicant, who has had a long-standing application for pension, if such pension is eventually granted and the applicant learns that he is to receive retroactivation of not more than one year, or even of three years, under the Act?

Brigadier Reynolds provided the following answer: ³³

In the instance mentioned above the average applicant is very annoyed, to put it mildly. The average applicant believes that pension entitlement should be effective at least from the date of his application for pension.

Assessment while undergoing treatment for a pensionable condition

The Legion made representations concerning the necessity for the Commission to ensure that a pension examination was carried out on all pensioners who were undergoing treatment for their pensionable condition. Speaking of the retroactive aspect of this, Mr. Thompson suggested that if the Commission did grant an increase of 20% or more following an examination in hospital, the award should be reviewed to determine whether a higher assessment should have been in effect prior to the examination.

HISTORY

The original Pension Act of 1919 provided that the payment of pension shall be retroactive, in the case of a person awarded a pension for a disability subsequent to release from the Forces, from the day upon which the application for pension was received. The relevant section of the Act read as follows: ³⁴

28(b) In the case in which a pension is awarded to an applicant the appearance of whose disability was subsequent to his retirement or discharge from the forces, in which case the pension shall be paid from the day upon which the application for pension has been received;

This provision was amended in 1924 to provide retroactivation of six months. The relevant section of the Act read as follows: ³⁵

In the case in which a pension is awarded to an applicant the appearance of whose disability was subsequent to his retirement or discharge from the Forces, in which case a pension may be paid from a date six months prior to the day upon which application for pension has been received or from the date of the appearance of the disability whichever is the later date.

This section was re-numbered 27(b) in the revised Statutes of Canada 1927, but no change in intent was made. ³⁶

This provision in the Act was amended in 1936 to provide that retroactivation in entitlement for disability could be awarded from the date of application where such was less than 12 months from the date for the grant or, where the entitlement was granted on a date more than 12 months subsequent to the date upon which application was made, the Commission could, in its discretion, grant retroactivation not exceeding 12 months. Provision was made also for a further six months retroactivation where hardship or distress was involved. The relevant sections of the Act were as follows: ³⁷

History

- 27(1) A pension awarded for disability shall be payable with effective as hereinafter set forth:
- (a) When entitlement to pension is granted by the Commission, or by a quorum thereof, or by the Court, upon a date less than twelve months subsequent to the date upon which application therefor was made to the Commission; from the date of grant, or, in the discretion of the Commission, from a date not earlier than the date of application;
 - (b) When entitlement to pension is granted by the Commission, or by a quorum thereof, upon a date more than twelve months subsequent to the date upon which application therefor was made to the Commission; from the date of grant, or, in the discretion of the Commission, from a date twelve months prior to the date upon which the decision of the Commission or of the quorum was rendered;
 - (c) When entitlement to pension is either granted or refused by a quorum of the Commission upon a date more than twelve months subsequent to the date upon which application therefor was made to the Commission, and the Court thereafter grants entitlement; from the date of the quorum decision, or, in the discretion of the Commission, from a date twelve months prior to the date upon which such quorum decision was rendered;
 - (d) When entitlement to pension is granted by the Court, as the result of an appeal by the applicant, directly from an adverse decision of the Commission, and the date upon which the decision of the Court was rendered is more than twelve months subsequent to the date upon which application therefor was made to the Commission; from the date of grant, or in the discretion of the Commission, from a date twelve months prior to the date upon which such decision of the Court was rendered.
- (2) Notwithstanding any limitation contained in this section, the Commission may, in its discretion, made an additional award not exceeding an amount equivalent to an additional six months pension in cases where it is apparent that hardship and distress might otherwise ensue.

History

The annotation in Bill 26, amending the Pension Act, stated as follows: ³⁸

This is new and takes the place of Section 27 of the Act. It provides that when entitlement is granted, an applicant may receive not more than 18 months retroactive pension. ,

Provision was made in the legislation of 1936 for retroactivation of 18 months in entitlement for death as follows: ³⁹

37(1) Pensions awarded with respect to the death or a member of the forces shall be payable with effect as hereinafter set forth:

(a) To or in respect of his widow or child, or to his parent or any person in place of a parent who was wholly or to a substantial extent maintained by him at the time of his death.

(i) When application is made therefor upon a date less than twelve months subsequent to the date of death, from the day following date of death;

(ii) When application is made therefor upon a date more than twelve months subsequent to the date of death, from the date of application or such earlier date as the Commission may determine;

(iii) When application has been made therefor and entitlement has been refused by the Commission or a quorum of the Commission and, as a result of a decision of the Court or a reconsideration by the Commission or a quorum of the Commission, entitlement is granted, from a date not exceeding twelve months prior to the date on which a decision was first rendered by the Commission.

(b) To a parent or person in place of a parent who was not wholly or to a substantial extent maintained by him at the time of his death, from a day to be fixed in each case by the Commission

(c) In respect of his posthumous child, from the date of its birth

History

- (2) Nothing in this section shall be deemed to authorize the payment of any pension in respect of a member of the forces who has died, for any period prior to the date of death, or for any period in excess of eighteen months prior to the date on which pension is finally awarded.

The annotation to this section read as follows:⁴⁰

This is new. It provides that in death claims, payment shall be made from certain dates and in no case shall any payment of retroactive pension be made for a period in excess of 18 months prior to date of final award.

Order-in-Council PC 9553 of December 27th, 1944 suspended, for the duration of the war and for one year afterwards, all time restrictions in respect to applications for entitlement to pension arising out of World War II.

1944

Order-in-Council PC 2395 of April 9th, 1945, clothed the Pension Commission with discretion to award an additional 18 months pension where, through delays in securing service or other records, or through other administrative difficulties beyond the applicant's control, an injustice might ensue. The relevant clause in this Order-in-Council read as follows:⁴¹

1945

Notwithstanding any limitations contained in Sections 27 and 37 of the Pension Act, the Canadian Pension Commission may, in its discretion, in respect of service during the war with the German Reich, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue; provided that no payment may be made under this regulation in respect of any member of the forces who has died, for any period prior to the date of death.

History

The provision of Order-in-Council PC 2395 was incorporated into the Pension Act by an amendment in 1946 which read as follows: ⁴²

Notwithstanding any limitations contained in this section, the Commission may, in its discretion, in respect of service during World War II, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records, or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue.

The annotation with respect to this amendment read as follows: ⁴³

This amendment adds a new subsection to this section. It makes no change in the law as this was effected by Order-in-Council under the War Measures Act dated April 9, 1945 (P.C. 2395).

The provisions governing the date from which pension is payable for disability were introduced in to the Pension Act in 1936 to eliminate large retroactive payments in claims arising out of World War I, the majority of which were initiated many years subsequent to the applicant's discharge from the forces.

The proposal was made in Bill 339 submitted to the House of Commons during the 1954 session, that Sections 31(3) and 42(3), which provided an additional 18 months pension under certain circumstances involving service during the second World War, be abolished. 19

The annotation in Bill 339 read as follows: ⁴⁴

In 1945, owing to delays in securing service documentation for World War II personnel many of whom had served with United Kingdom and other forces, provision was made by Order in Council P. C. 2395 of April 9th, 1945, for an additional retroactive period of 18 months where delays resulted from administrative and other causes beyond the applicant's control.

The original Order in Council stipulated the benefit would be limited to the duration of the war or one year thereafter.

History

Statutory effect was given in Chapter 62 of the statutes of 1946, but the limitation was not incorporated.

There is no cause for delay now, documentation is available, appeals are heard very soon after they are listed as ready.

It is considered the proviso has served its original intent and the procedure for World War I and World War II claims should be uniform. It allows for a retroactive period of 12 months and an additional 6 months in cases of hardship and distress.

By departmental regulation, reimbursement for allowable treatment expenses for the pensionable condition may be granted for a period not exceeding 3 years from the effective date of the Canadian Pension Commission award.

The Special Committee on Veterans Affairs which studied Bill 339 recommended not only that these subsections remain in the Act, but that they be made applicable also to World War I cases. The Committee's report read in part: ⁴⁵

The Committee would, however, recommend that the Government consider the advisability of amending subsection (3) of Section 31 and subsection (3) of Section 42 of the Pension Act by striking out the words "in respect of service during World War II" where they appear in the said subsection.

The amendments were approved by the House of Commons and read as follows: ⁴⁶

- 31(3) Notwithstanding any limitations contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records, or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue.

History

42(3) Notwithstanding limitations contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records or through other administrative difficulties, beyond the applicant's control it is apparent that an injustice might otherwise ensue; but no such payment may be made in respect of any member of the forces who has died for any period prior to the date of death.

A memorandum to the members of the Pension Commission from Mr. L.A. Hutch, Acting Chairman of the Commission, dated June 22nd, 1954, gave the following reason for the restriction of 18 months: ⁴⁷

This restriction was placed in the Pension Act in 1936 "to eliminate large retroactive payments in claims arising out of World War I, the majority of which were initiated many years subsequent to the applicant's discharge from the Forces".*

During the discussions by the Veterans Affairs Committee of 1954 consideration was given to whether there was any co-relation between subsections 1, 2 and 3 of Sections 31 and 42. Up to that time, the Pension Commission followed the policy under which an additional award not exceeding six months could be granted only if, in the first instance, the Commission had granted 12 months additional pension under

* This explanation was not given in the annotation in the Bill amending the Pension Act in 1936. It appears to have been quoted from Order-in-Council PC 2395 of April 9, 1945, the relevant section of which read as follows:

And WHEREAS the provisions governing the date from which pension is payable were introduced into the Pension Act in 1936 to eliminate large retroactive payments in claims arising out of the Great War, the majority of which were initiated many years subsequent to the applicant's discharge from the Forces.

History

subsection 1. Further retroactivation of 18 months in accordance with subsection 3 could be only awarded if the pensioner had been granted the 12 months and 6 months retroactivation provided in subsections 1 and 2 respectively.⁴⁸

The effect of the Parliamentary Committee's discussion was reported in a memorandum to the Commissioners from the Acting Chairman under date of June 22, 1954, as follows:⁴⁹

A full discussion also arose in the Committee as to whether there is any co-relation between Subsections (1), (2), and (3) of the Act, i.e., as to whether an award under Subsection (2) was in any way dependent upon an award under Subsection (1), or whether an award under Subsection (3) was in any way dependent on an award under Subsection (2) or Subsection (1). The Committee finally expressed their view that there was no such relationship. The Chairman then assured the Committee as follows:

"Now, Mr. Green asked if I was convinced regarding the application of section 31, subsection 3 and its relationship to section 31, subsection 2.

Let me say this, Mr. Chairman, to the members of the Committee, as I have in the past, there has been no occasion when the Commission has not very carefully, as well as conscientiously considered any recommendations emanating from the Committee.

History

As an example in that regard I refer you to one you know so well - the stabilization of World War I pensions. I have already discussed with my colleagues the debate which took place here last week regarding Section 31, subsection 3 and may I say that there is an item on the agenda for the next general meeting of the commission at which due note will be taken and the whole subject reconsidered".

At a general meeting of the Commission on September 1, 1954, the following resolution was approved: 50

Applications under Section 31(3) or 42(3) will be considered on their merit, independently of Sections 31(2) or 42(2).

The Pension Act has not been amended in regard to retroactive payment of pension since the amendments of 1954.

COMMITTEE RECOMMENDATIONS

(116) That the Act be amended to provide that an award of pension be retroactive from a date not more than five years prior to the date of grant or from the date of original application, whichever period of time is lesser.

Five Years
Retroactiva-
tion

(117) That the Act be amended to provide that, where a delay in an award of pension has occurred through an error in administration, procedure or other performance of the Canadian Pension Commission or an appellate body, excluding the exercise of discretion in adjudication, entitlement may be granted from the date of the original application notwithstanding, the limitation of five years as proposed in Recommendation (116) above.

If error,
retroactiva-
tion from
date of ap-
plication
regardless
of five year
limit

(118) That the Act be amended to authorize the Commission to grant retroactive pension to an applicant from the date of application, or five years from the date of grant as provided in Recommendation (116) above, notwithstanding any evidence to the effect that the applicant was responsible for the delay.

Applicant not
to be penal-
ized for
delay

(119) That the Commission staff be required, in preparing applications for decisions of the Commission, to request a decision in all instances concerning the possibility of retroactive pension, and if the full period of retroactivation is not granted, the Commission be required to give the reasons therefor, as part of its decision.

Commission
to give
consideration
automatically
and to show
reasons if
retroactiva-
tion not
awarded

Committee Recommendations

(120) That the Act be amended to provide authority for the Commission to award retroactive pension for increases in the degree of aggravation of a disability or increases in an assessment of a disability within the same limits as entitlement decisions.

Retroactive
to Apply
Aggravation
and Assessment

(121) That the Act be amended to provide that, where a retroactive award of pension is made, and the Commission decides that the applicant did not have an assessable degree of disability during the retroactive period in the same extent as the assessment which is given him on the basis of a medical examination at the time of the award, the Commission shall not be allowed to reduce the assessable degree of disability for the retroactive period by more than 50% of the amount of assessment deemed to exist at the date of the award.

Assessment
Not To Be
Reduced
Below 50%

(122) That the Commission ensure that where practical, a pension medical examination be carried out on a pensioner undergoing treatment in hospital for a pensionable condition, and that if such examination results in an increase in assessment, consideration be given to a retroactive award for such period as may be determined that the pensioner has had an increase in disability.

Pension
Examination
While in
Hospital:
Assessment
to be
retroactive

COMMENT

Your Committee notes that the provisions in the 1936 amendments of the Act which provided limitations for retroactive pension were set out in Bill 26 and that no reason for these limitations was given in the annotation. A reason was given ten years later in connection with Bill 339 which was before the House of Commons in 1946. This reason was stated to be due to the necessity to avoid payment of retroactive pension in a large amount, where an award was granted many years after the initial application.*

It seems to your Committee that the real issue in regard to retroactivation is not the amount of money involved, but whether there has been a delay in granting an award. Your Committee considers that the applicant should be entitled to pension from the date of his application.

Where there is a considerable lapse of time between the date of application and the date of the award, it is reasonable to impose a limitation of five years under ordinary circumstances. If, however, the delay has been caused through an error in the performance of the Commission the five year limitation should not apply, as explained later in this comment.

In making this recommendation, your Committee suggests that the existing provision for payment of 12 months retroactive pension be extended to five years, or the date of application whichever is the lesser period of time, and that it apply to discretionary awards as well as entitlement claims. The acceptance of this recommendation would eliminate the existing provision for the payment of an additional award not exceeding six months pension where hardship and distress are involved. Your Committee considers that the principle of awarding an additional six months pension on the basis of hardship and distress

* See page 967 hereof.

Comment

has no place in the Pension Act. Consideration regarding retroactive pension should be based mainly upon two facts, i.e., the lapse of time since the date of application and the date from which an assessable degree of disability has existed (where applicable). Pension, except in certain peripheral areas such as that for dependent parents, is not awarded on the basis of financial circumstances and, in the view of your Committee, the existence of hardship or distress is not a factor in any decision in respect of retroactive pension.

Error in the Performance of the Commission

The existing provision regarding entitlement makes possible a maximum period of retroactivation of three years, i.e., one year where there has been an ordinary time lapse, an additional six months where hardship and distress exist and a further eighteen months where there has been delay through administrative difficulties beyond the applicant's control.

This limitation has had the effect of restricting a payment of pension for an entitlement award to three years. This could apply even where the Commission acknowledges that there had been a longer delay through admitted fault on its part.

The Commission has interpreted Section 31 of the Pension Act to mean that the Commission is prohibited from making an award of pension retroactive for a period of more than three years. This was confirmed in a decision of the Commission under date of April 3rd, 1956, which adopted a finding of a Committee of the Commission as follows: 5:

Comment

The Committee finds that Section 31 of the Pension Act prohibits the Commission from making an award of pension retroactive for a longer period of time than the statutory 36 months provided by Section 31.....

This principle was enunciated earlier in a letter to the Chief Pensions Advocate from L.A. Mutch, Acting Chairman of the Commission, under date of February 23, 1956, which read in part: 52

There is no doubt that the Commission has and does hold that Section 31 of the Pension Act prohibits the Commission from making an award of pension retroactive for a longer period of time than the statutory 36 months provided for in Section 31.....

It was only about a year ago that this principle was tested in a case where application had been made and no action taken for a period of nearly ten years. When the matter was brought to the attention of the Commission, an award of entitlement was made, and the full provisions of Section 31(1), (2) and (3) were invoked. This particular case was the subject of some discussion before the last Parliamentary Committee, at which time the Chairman indicated that in cases where a grant of entitlement was delayed through error on the part of the Commission or its servants, it was a practice of the Commission to rectify the error to the full extent of the provisions of Section 31, beyond which the Commission had no power to go.

Your Committee considers that where the error is in administration, procedure or some other area of performance by the Commission (except adjudication), the applicant should be entitled to retroactive pension from the date of his application. If his application was automatic, in that the disability presumably existed at the time of his retirement or discharge from the forces or at the time of completion of treatment or training by the Department of Veterans Affairs, he should be entitled to pension from date of such retirement or discharge. In both instances it should be a necessary proviso that retroactivation be granted only for the period during which there is evidence that the disability existed in him.

Comment

It will be noted that your Committee suggests that this provision not extend where there has been a delay in an award of pension due to previous adjudications by the Commission or an appellate body, where such had been of negative nature. This is to say that an applicant should not be entitled to retroactive pension of greater than five years, even though his application was made prior to that time, if the delay has been the result of previous refusals by the Commission in cases where, subsequently, the Commission has approved an award. Such refusals could not properly be called errors, as the administrators of the Pension Act must exercise their judgement on the basis of the evidence before them. Where, in a later adjudication, previous decisions are reversed, and an award is made, your Committee does not consider that the previous adjudications could be described as "error" and the provision to extend retroactivation beyond the five year limitation would not apply.

The circumstances where this provision would apply include those where a file had been mislaid, medical proceedings on discharge have been incorrectly interpreted or perhaps an applicant has not been accorded his full procedural rights under the Act.

Submissions by Commission Staff for Decision

Your Committee considers, as has been stated previously herein, that in regard to retroactive pension up to the five year limitation an applicant should be entitled to pension from the date of his application, provided he has had an assessable degree of disability over that time. The only onus on the applicant is to make application. Once he has done this, he has fulfilled his obligation and if there has been a delay in granting pension, whatever the reason, the applicant should not be penalized therefor.

Comment

Your Committee has recommended, also, that there be a requirement upon the Commission staff, in preparing cases for decision of the Commission, to include in the submission the request for a Commission decision concerning the possible award of retroactive pension. This proposal is made to ensure that consideration is given, in every instance, not only to the award itself, but also to any retroactive pension to which an applicant may be entitled.

Increase in Degree of Aggravation and Assessment

Your Committee notes that increases in the degree of aggravation or in assessment are not made retroactively. There seems no justification for this. Should a pensioner make application for an increase in the degree to which the aggravation of his disability is attributable to service, and the pension administrators subsequently grant an increase in this degree, he should be entitled, under ordinary circumstances, to pension increases on a retroactive basis in accordance with the new decision of the Commission, from the date of his application therefor. It is presumed, in such cases, that the new decision would be based on information or evidence which was not available at the previous adjudications. Your Committee does not consider, in such case, that the pension for the increased degree of aggravation should be made effective to the date of the original application. It should be limited only to the date of the application for an increase in the degree of aggravation.

Where a pensioner requests an increase in his assessment, and such is approved, the effective date should be the date of the application for the increase, provided of course that the pension administrators are satisfied that the assessable degree of disability for which pension is subsequently

Comment

granted existed in the pensioner from the date of his application for an increase.

Your Committee suggests that, in regard to the five year limitation and all other respects, applications for an increase in the degree of aggravation and in degree of assessment should be made the subject of the same retroactivation provisions as for entitlement.

War Veterans Allowance

Your Committee noted the observation in several representations from veterans organizations to the effect that the War Veterans Allowance Regulations provide that an award shall commence from the date of application. In general applications for pension may be more involved than those for War Veterans Allowance. Notwithstanding, your Committee considers that, in so far as possible, the provisions of the Pension Act should not be less generous than those of the War Veterans Allowance Act.

The relevant Regulation under War Veterans Allowance Act made by Order-in-Council PC 1964 - 1152, dated July 23, 1964, reads:

Except as authorized in Subsection (1) of Section 14 of the Act, no award shall be made in respect of any period preceding the date upon which the application for allowance was received by the District Authority.

Assessable Degree of Disability

It is evident that a retroactive award of pension should be made only for the period during which the applicant has had an assessable degree of disability. It would not be logical to award retroactive pension for five years, even though application for pension had been made at least five years prior to the date of the award,

Comment

unless the applicant has had an assessable degree of disability during the total five year period.

The problem arises in cases of this nature where the disability was not assessed at the time of application; or, if an assessment had been made, where the disability had increased since the original assessment.

The practice of the Pension Commission, when entitlement is granted for a disability which has developed subsequent to the member's discharge is to grant retroactivation only if there is evidence of an assessable degree of disability over the period during which the application has been pending.⁵³

When entitlement is granted, the Commission will confirm the assessment and, if a period of retroactivation is approved, the Medical Advisory Branch will be requested to give an opinion, from the records, as to whether an assessable degree of disability has existed during the retroactive period, and the percentage thereof.

Your Committee notes that this must necessarily be an arbitrary procedure. It would not be practical for the Commission to assess the disability in every applicant at the time of his application, in that such assessment is of value only if the entitlement is granted. Hence, the only reasonable procedure is to make this assessment if and when entitlement has been approved. When an applicant is entitled to retroactivation, however, the Commission is faced with the problem of deciding whether the degree of assessment which has been determined at the date the award has actually existed on a retroactive basis, and if so, in what degree and how long.

Comment

If an award is not made immediately following the date of the original application, and the disability has not been assessed, the problem is a difficult one. Your Committee considers that where there has been a delay, the applicant is entitled to generous consideration as to the extent of the disability which has existed between the date of the original application and the date upon which the disability was assessed.

Accordingly, your Committee has recommended that ordinarily retroactivation should be awarded at the rate of the assessment shown at the date of the award. If the Commission has positive evidence that a lesser degree of disability did, in actual fact, exist during the retroactive period, the retroactivation may be awarded at a lesser rate. Your Committee considers it essential, however, to provide some "built-in" protection for the applicant and has suggested that, in no case, the assessment for a retroactive award be at less than 50% of the assessment shown at the date of the award.

To illustrate, an applicant may have applied for pension in July, 1962. The Pensions Medical Examiner in the district office will have furnished a medical report, but the condition may not have been given an actual assessment. The application is refused at first hearing and fails again in successive renewal hearings, but is approved in accordance with a decision of an Appeal Board of the Commission in 1965. Following this approval, the condition is assessed at 60%, and the Commission agrees to retroactivation of three years.

The Medical Advisory Branch reviews the records and gives an opinion that the assessable degree of disability at the time of the date of the original application was only 25%. Under the proposal submitted herein, the Medical Advisory Branch would firstly have to have fairly definite

Comment

medical opinion to support its opinion and, if such advice were obtained, the Commission would still be required to approve the retroactive award at 30% in accordance with the proposal that, under no circumstances, could the retroactive award be less than 50% of the assessment approved at the date of the award, i.e., 60%.

Examination While Undergoing Hospitalization

It seems apparent to your Committee that arrangements should be made to ensure that a pensioner undergoing hospital treatment for a pensionable condition is given a new pension examination; and that the most feasible time for such examination is while he is in hospital, where medical staff is available to conduct this. Your Committee has made a recommendation accordingly.

In addition, your Committee was impressed with the soundness of the proposal that where a medical examination carried out in hospital indicated a sizeable increase in the assessment of the disability, the Commission should give full consideration to the possibility of making that assessment retroactive.

It does not seem reasonable to suggest that where a sizeable increase, say 20% or more, is granted on the basis of a pension re-assessment in hospital the condition worsened while he was in hospital. There seems good grounds to suggest that the assessment would have been larger, had the pensioner been given a pension medical examination sometime before his admission to hospital. The fact that this increased assessment is discovered only while he is undergoing treatment is of little importance, and your Committee wishes to emphasize that if there is information to indicate that the disability was greater prior to the pension medical examination in hospital, then the pensioner should be entitled to a retroactive award of pension accordingly.

RETROACTIVE AWARDSREFERENCES

1. Pension Act, Sections 31(1)(b), (2) and (3) and 42 (2) and (3).
2. Minutes, General Meeting of the Canadian Pension Commission, April 9th, 1947.
3. Ibid, June 29th, 1948.
4. Ibid, April 29th, 1947, June 29th, 1948 and September 1st, 1954.
5. Ibid, April 29th, 1947, June 29th, 1948 and September 1st, 1954.
6. Ibid, April 3rd, 1956.
7. Ibid, September 5th, 1958.
8. Canadian Pension Commission Routine Instruction No. 113, October 7th, 1952.
9. Proceedings of Committee Sessions, Volume I, Page D-8.
10. Ibid, Volume II, Page G-4.
11. Pension Act, Sections 31(2) and 42(2).
12. Proceedings of Committee Sessions, Volume II, Page G-7.
13. Ibid, Volume II, Page J-36.
14. Ibid, Volume II, Page K-50.
15. Ibid, Volume II, Page K-51.
16. Ibid, Volume III, Page L-152.
17. Ibid, Volume III, Page L-153.
18. Ibid, Volume III, Page L-153.
19. Ibid, Volume III, Page L-132.
20. Ibid, Volume IV, Page Q-10.
21. Ibid, Volume IV, Page Q-11.
22. Ibid, Volume IV, Page R-46.
23. Ibid, Volume IV, Page R-48.
24. Ibid, Volume V, Page S-12.
25. Ibid, Volume V, Page S-13.
26. Ibid, Volume V, Page Y-21.
27. Ibid, Volume V, Page Y-22.
28. Ibid, Volume V, Page Z-9.
29. Ibid, Volume VI, Page KK-52.
30. Ibid, Volume VI, Page KK-22.
31. Ibid, Volume VI, Page KK-52.
32. Ibid, Volume VI, Page KK-53.
33. Ibid, Volume VI, Page KK-53.
34. SC. 1919, C.43, assented to July 7th, 1919.
35. SC. 1924, C.60, s.5, assented to July 19th, 1924.
36. SC. 1936, C.44, s.15, assented to June 23rd, 1936.
37. SC. 1936, C.44, s.15, assented to June 23rd, 1936.
38. Bill 26, as passed by the House of Commons, June 12th, 1936, Page 8.
39. SC. 1936, C.44, s.20, assented to June 23rd, 1936.
40. Bill 26, as passed by the House of Commons, June 12th, 1936, Page 10.
41. Order in Council, PC. 2395 dated April 9th, 1945.
42. SC. 1946, C.62, s.18, assented to August 31st, 1946.
43. Bill 329, as passed by the House of Commons, August 1st, 1946, Page 10.
44. Bill 329, as passed by the House of Commons, June 9th, 1954.
45. Proceedings, Special Committee on Veterans Affairs 1954, Fourth Report, Page 438.
46. Bill 329, as passed by the House of Commons, June 9th, 1954.
47. Canadian Pension Commission Subject File on Retroactive Awards (Section 31)
48. Ibid, Memorandum dated March 20, 1947 to Heads of Branches, Canadian Pension Commission by the Commission Secretary, W.E. Dexter.
49. Ibid, Memorandum, dated June 22nd, 1954, to the Commissioners from L.A. Mutual Acting Chairman, Canadian Pension Commission.
50. Minutes, General Meeting, Canadian Pension Commission, September 1st, 1954.
51. Minutes, General Meeting, Canadian Pension Commission, April 3rd, 1956.
52. Canadian Pension Commission Subject File on Retroactive Awards.
53. Minutes, General Meeting, Canadian Pension Commission, June 29th, 1948.

CHAPTER 31STABILIZATION OF PENSIONGENERAL

Under date of June 23, 1948, the Chairman of the Canadian Pension Commission issued a memorandum to Medical Advisers of the Commission stating that where a pension rate had been stationary for three years or more, and where the condition resulting in disability was permanent in character, the Commission would treat the disability as permanent. The relevant excerpt from this instruction follows:¹

It is the intention of the Commission to continue to treat World War I pension list as more or less permanent in character where,

- (1) the rate has been stationary for three years or more, and
- (2) where the condition resulting in disability is permanent in character.

The effect of this instruction has been that where a World War I pensioner has been in receipt of an assessment for three years or more, that assessment will not be reduced.

This policy was reaffirmed at a general meeting of the Pension Commission on October 14, 1949, as follows:²

There shall be no reduction in World War I pensions where the rates have been stationary for three years or more. (This general policy does not apply where, at the request of the pensioner, the disability has been reduced or removed by surgical interference).

REPRESENTATIONS AND EVIDENCE

Your Committee received a heavy volume of representations to have the stabilization policy now in effect for World War I pensions extended to World War II pensions. This policy provides that a pension in effect for three years shall not be reduced.

Association of Canada - (Toronto Branch): In a prepared submission, the organization made the following recommendation: ²

Resolved that the pensioners of the Second and subsequent wars should have their pensions stabilized and made irreducible, the same as those of the First Great War.

In discussion of this recommendation, the representatives of this association stated that the basis of a stabilization policy should be the length of time which the pensioner had carried his disability, rather than his age. Mr. E.P. Cameron, President of the association, stated as follows: ⁴

I think one of the big items here as well in the Second World War is the fluctuation of pensions. Where younger veterans are raising a family their pension could be 40 percent one month, and the next year, or a few months later, it could be 50, and conversely reduced or increased but if that veteran dies in the meantime and he has less than 48 percent, then his pension dies with him, and thereby his family suffer. They have to carry on without benefit of his pension provided he dies of a disability less than 48 percent.

Royal Canadian Legion: In a prepared brief the Legion recommended as follows: ⁵

In 1948 the Canadian Legion adopted the "Stabilization Policy" whereby assessments relating to World War I disability pensioners were protected in that the assessment became "fixed" after three years. Recent Dominion Conventions of the Legion have passed resolutions asking that a similar policy of Stabilization be implemented to protect the disability pensioner of World War II - where the said pension had been in payment at a given rate for a period of five years.

Representations and Evidence

The Minister commented on 21.9.65 that the, "Commission is following a policy designed to give some stability to the pensions while at the same time keeping an eye on those pensioners pensioned for conditions which are likely to worsen with the passing years..." The Legion submits that as it is now more than 26 years since the commencement of World War II, the Commission should institute a policy of stabilizing World War II pensions on the same basis as World War I.

There was some discussion concerning the time element in regard to the establishment of a stabilization policy. This was as follows:

Mr. Justice Woods: World War I was stabilized when? In 1948?

Mr. Thompson: In 1948.

Mr. Justice Woods: That was 30 years after the end of the war.

Mr. Thompson: Yes, that is correct.

Mr. Justice Woods: You suggest we should do it here 20 years after the end of the war?

Mr. Thompson: Yes. We don't think, sir, there is any significance in the fact that it happened 30 years after the First World War. That was just the time the action was taken. I think the unrest and the problems that were created that led up to this decision to stabilize them existed sooner than the action taken in 1948.

Mr. Justice Woods: Is there any real difference that might be said to exist between the circumstances of the World War I veteran and the World War II veteran relating to the nature of the war in which they engaged?

The World War I veteran, particularly a man who saw front line service, from what I can gather lived in quite different circumstances than the World War II veteran. Is there anything in this? I have heard this mentioned on occasion.

Mr. Thompson: I don't think you can ignore the fact that conditions were different in World War I. Most Canadian forces were in the Army. I don't think that had anything to do, sir, with the question of stabilization of pensions because all the stabilization of pensions does is to give the man security on his pension, and he knows that if his condition worsens he can be examined and it can be increased.

Representations and Evidence

It is not like the pension for all times. If his condition worsens it may be raised, and if it remains the same, it remains stationary for three years, and it is held at that level, so it does give him some peace of mind and security.

Mr. Jack McIntosh, M.P.: Mr. McIntosh stated: ⁷

The Commission now provides that a World War I pensioner who has had a pension for five years will not have his assessment reduced even if his condition improves. Veterans organizations are asking for similar provisions for World War II pensioners.

I fail to see any difference between the two.

Mr. McIntosh agreed that it was unfair to disturb a man's circumstances substantially by reducing a pension which had been in payment for a reasonable period of time, and that the expense to the public would not be large.

L'Association du 22ième Inc.: In a prepared brief, this Association made the following recommendation: ⁸

Recommendation 7: Stabilization

World War II pensions should be stabilized in the same manner as World War I pensions.

The Canadian Pension Commission has established a policy which, in effect, stabilizes all the World I pensions. This means, in effect, that once a pensioner has drawn a pension for three years, the pension would not be reduced even though, on medical re-board, the Pension Medical Examiner came to the conclusion that the pensionable condition had improved. This was done in order to give the pensioner some stability upon which he could build his standard of living rather than have his pension reduced after he had become accustomed to a certain pension income over a period of three years.

The Canadian Pension Commission has refused to put through a similar policy for World War II veterans, presumably on the grounds that many World War II veterans have a considerable number of years of life expectancy, and this could be a costly policy for the Government.

Representations and Evidence

On the other hand, this Association contends that the principle was sound for World War I veterans, and it is equally as sound for World War II veterans, regardless of the number of years of life expectancy left. The World War II veteran should be entitled to the same policy - and indeed, they have earned the right to this type of security if they have carried the pensionable disability for a period of at least five years.

The following discussion ensued: ⁹

Mr. Justice Woods: Your purpose here is stability so the veteran can plan?

Major Paul Clavel: That's right, sir.

Mr. Justice Woods: To avoid the fact that a pension could be decreased without notice, in effect?

Major Paul Clavel: Or taken off altogether.

Mr. Justice Woods: Yes, in this day and age, as you mentioned, of instalment payments, it is probably not worth more than none at all.

Major Paul Clavel: Furthermore, the arguments we used to put it through for first war veterans are now valid because it is about 25 years since the second war is over.

Canadian Pension Commission: In its presentation before your Commission under date of March 21st, 1966, Mr. T.D. Anderson, Commission Chairman stated as follows: ¹⁰

Stabilization of W. W. II Pensions

The Legion does not quote the Minister's statement in its entirety here. For the information of the members of the Committee the complete statement by the Minister is quoted hereunder. This, I think, throws an entirely different light on the matter.

The Statement that a stabilization policy for pensions protects the interests of the pensioner is not necessarily true. Unfortunately, it can and has on occasion had exactly the opposite effect. For example, a man with a 35% pension does not take advantage of his right to seek a medical examination by our Pension Medical Examiner because he feels the condition is no worse, and he is not called in because of the stabilization policy. Many veterans

Representations and Evidence

of excellent character and with good war service records have steady jobs and do not wish to disrupt their work in order to go for a medical examination; these men and their families are the ones who suffer because of the stabilization policy. Over the years, the 35% pensioner's disability may well have slowly deteriorated to the point where his assessment should have been over 50%. While still assessed at 35%, he dies of something other than his pensionable disability, and his widow gets no pension.

At present, the Commission is following a policy designed to give some stability to the pensions while at the same time keeping an eye on those pensioners pensioned for conditions which are likely to worsen with the passing years. Most pensioners are not called in at regular intervals, but are left free to report as and when they wish. The files of those suffering from pensionable conditions which are likely to worsen are reviewed regularly, and the pensioner himself may be called for medical examination at regular intervals.

That is, if the medical examiner, or a review of his file, figures that his condition may have deteriorated he then calls him in for medical examination.

The Commission Chairman said that the policy, as outlined in the Minister's statement, was that of the Pension Commission. He suggested that the Commission's policy was "probably the most adequate form of stabilization that can be adopted to the best advantage of veterans and their dependents" "

Mr. H.W. Herridge, M.P.: Mr. Herridge stated that he was in favour of a stabilization policy for World War II veterans and gave his reasons as follows

Well, if it has been recognized, and if it has been admitted by the decision of the Pension Commission that the disability has been in existence for twenty years, shall we say, or more, I think they should receive the same treatment as First World War veterans, and also I believe there might be some saving in this as far as calling him up for examination and things of that sort. I don't know what amount would be saved in that respect.

Representations and Evidence

The Honourable Gordon Churchill, P.C., M.P. Mr. Churchill referred to the stabilization policy in regard to World War I pensioners and stated: '3

That practice was put into effect with regard to the first world war pensioners. I have not the facts in front of me as to what was done or at what stage, but I would be inclined not to make a reduction even if the man showed improvement. Stabilize it.

HISTORY

The first recorded indication of stabilization which came to the attention of your Committee was a memorandum issued by the Chairman of the Canadian Pension Commission under date of February 12th, 1936, in which he stated: ¹⁴

Generally speaking, it is the intention of the Commission that, in the future, periodical examinations should be eliminated except in those cases where there is a substantial probability that there has been an increase in the disability and that, therefore, the soldier might be entitled to more pension as a result of a further examination. In other words, we propose to treat our present pension list as more or less permanent in character.

What we want to accomplish is, first, to give the soldier some assurance of the permanency of his pension and, secondly, to avoid the tremendous expense which has occurred in the past by the large number of periodical examinations made in the districts, with no resulting change in the soldier's assessment.

In a later memorandum the Commission Chairman stated: ¹⁵

Surely the time must arrive when the pensioner should be able to regard his pension as permanent, at least insofar as the basis of his entitlement is concerned.

The Commission Chairman issued a memorandum under date of December 9th, 1947, in which he referred to the instruction issued by his predecessor under date of February 12th, 1936, (see above) and made certain suggestions including: ¹⁶

Pensions for all diseases should be considered generally as permanent, and the pensioner should not be called in for further examination except in cases of complaints or discharge from hospital following treatment.

In cases of high disability pensioners, but not total disability, who are pensioned for such progressive conditions as Diabetes, Nephritis, Cardio-vascular Diseases, Advanced Bronchial Conditions, other than Tuberculosis, and Advanced Generalized Arthritis, the Pension Medical Examiner should call in for examination only those cases in which he would expect the condition to have progressed since the last examination.

History

Where the assessments for diseases are small or moderate and they have remained more or less stationary for the previous examination or two, they should always be considered as permanent and not be brought in for further examination except upon complaint.

The Commission Chairman issued a further memorandum in regard to the examination of World War I pensioners which stated that, where a reduction in the assessment appeared indicated, such could be made only after the pensioner had been examined by two or more pension medical examiners, the report given special study by the Medical Advisory Branch and a special review by the Commission. Presumably this policy was instituted to insure that pensions in payment of World War I pensioners would be reduced only after the most careful consideration.

The Royal Canadian Legion submitted a brief to the House of Commons Special Committee on Veterans Affairs under date of March 15th, 1948, which contained the following recommendation:¹⁷

Stabilization of Pensions -- World War I

Recommendation--That the Pension Act be amended so as to stabilize the pensions of World War I pensioners, but permitting upward revision of pensions in cases where the disability has progressed by an extension of the automatic increase principle.

The average age of the pensioner of World War I is 59. At this age the chance of a pensionable disability improving to any appreciable degree is most unlikely. Cutting pensions at this age is not an economy and gives rise to great discontent and feelings of injustice.

The principle of granting automatic increases with advancing age has already been established in the case of pensioners suffering from gunshot wounds. The same principle should now be applied to all World War I pensioners, and thus bring to an end a discrimination that is felt to be unjust.

History

Brigadier J.L. Melville, Chairman of the Commission, stated to this Parliamentary Committee that the Commission had had a policy in effect since February, 1936, concerning medical re-examination of pensioners. His statement: ¹⁸

Generally speaking it is the intention of the Commission, that, in the future, periodical examinations should be eliminated except in those cases where there is a substantial probability that there has been an increase in the disability, and that, therefore, the soldier might be entitled to more pension as a result of a further examination. In other words, we propose to treat our present pension list as more or less permanent in character. If a soldier complains and the medical examiner is of the opinion that there is some foundation for his complaint, it will be left entirely to the discretion of the medical examiner in the district as to whether he calls the man in for a further examination. It will be expected that, in cases of complaint which look more or less reasonable on the face of them, medical examiners will not put the soldier to the expense of a medical examination by his own doctor, and particularly would this apply to local cases where an examination would not mean any outlay for transportation or loss of time. In cases where the medical examiner thinks there is very little probability of any change, it would be in order to ask for a doctor's certificate before re-examining. What we want to accomplish is to give the soldier some assurance of the permanency of his pension. There are further instructions which elaborate that point in more detail.

Brigadier Melville gave further explanation of this policy at a later meeting of the Committee on April 30th, 1948 as follows: ¹⁹

That policy was established on a very firm basis in 1936, and I will quote, in brief, from the instructions issued at that time: Generally speaking, it is the intention of the commission that, in the future, periodical examinations should be eliminated except in those cases where there is a substantial probability that there has been an increase in the disability, and that, therefore, the soldier might be entitled to more pension as a result of a further examination. In other words, we propose to treat our present pension list as more or less permanent in character.

History

What we want to accomplish is to give the soldier some assurance of the permanency of his pension.

Now, let me give you some details as to the application of that general policy.

The commission thinks we would be doing the soldier no injustice if we did not call him in for examination except on complaint, and that, if prompt attention is paid to complaints and reasonable action taken on them, there will be no substantial objection from the pensioners. In this connection the commission thinks it might make the following suggestions with reference to certain individual cases, but not in the way of interfering in any sense with the medical examiner's discretion:

(1) Gunshot wound cases should be permanent except in cases in which there is still a discharging sinus from any recent breakdown or operation.

(2) Pensions for all diseases should be considered generally as permanent, and the pensioner should not be called in for further examination except in cases of complaints or discharge from hospital following treatment.

(3) In cases of high disability pensioners, but not total disability, who are pensioned for such progressive conditions as Diabetes, Nephritis, Cardio-vascular diseases, advanced bronchial conditions, other than tuberculosis and advanced generalized Arthiritis, the Pension Medical Examiner should call in for examination only those cases in which he would expect the condition to have progressed since the last examination.

(4) Cases of Pulmonary Tuberculosis, who have been in receipt of pension at the rate of 100 percent for two years following activity during treatment with minimum lesions, should be examined at the end of the two-year period, and periodically thereafter as the Medical Examiner may decide.

(5) Where the assessments for diseases are small or moderate and they have remained more or less stationary for the previous examination or two, they should always be considered as permanent and be brought in for further examination except upon complaint

And it closes with this observation:

History

The Commission feels that the above will afford to our Pension Medical Examiners ample time to give more consideration and, perhaps, better service to the real problem cases, and will be able to give more assistance than in the past to cases which really require it.

In its report to the House of Commons, the Parliamentary Committee made the following recommendation:²⁰

That, in respect of World War I pension awards, no reduction in the assessment of disability shall be made, providing such assessment has been in effect for three years or more.

The stabilization policy in regard to World War I pensioners was set out in a memorandum to Medical Advisers by the Chairman of the Commission under date of June 23rd, 1948. The following extract from that memorandum is recorded hereunder:²¹

During the course of the proceedings of the Special Committee on Veterans Affairs of 1948, the question of stabilization of World War I pension awards received considerable attention. On the 4th May, 1948, the Committee unanimously resolved that the following recommendation should be made to this Commission:-

"That the Committee recommend that in respect of World War I pension claims, no reduction in the assessment of disability shall be made, providing such assessment has been in effect for three years or more."

Pensions for disabilities are awarded or continued in accordance with the provisions of Section 24 and 25 (1) (2) of the Pension Act.

It is the intention of the Commission to continue to treat our World War I pension list as more or less permanent in character where (1) the rate has been stationary for three years or more and (2) where the condition resulting in disability is permanent in character.

COMMITTEE RECOMMENDATIONS

(123) That in respect of pensions paid for disabilities attributable to, incurred during, or aggravated by service in World War II, no reduction in the assessment of a disability shall be made, provided such assessment has been in effect for three years or more.

World War II
Pensions To
Be Stabilized
After Three
Years

(124) That, in respect of disabilities which have arisen out of, or were directly connected with or related to service in peacetime in the Regular Forces, no reduction in the assessment of a disability shall be made, provided such assessment has been in effect for three years or more, and provided that the pension may not be stabilized within ten years of the pensioner's release from the period of service during which the disability or aggravation thereof had its origin.

Regular Force
Pensions To
Be Stabilized
After Three
Years If
More Than Ten
Years Since
Release From
Forces

COMMENT

Your Committee considers that stabilization of pensions is an essentially sound principle, having regard for the basic purpose of pension. It cannot be argued that an assessment, particularly in the case of pension paid for disease, necessarily remains at one level. Hence, from the medical viewpoint, stabilization may not seem desirable nor even necessary, in view of the fact that frequent medical re-examination is possible.

Your Committee is of the view however that a pensioner, once having been in receipt of a pension at a certain rate for a period of at least three years, should not be subjected to the possible financial problems which could follow a subsequent reduction in the pension rate. The medical staff of the Commission with its long experience, is competent to assess the degree of disability and, if necessary, to forecast the progress of that disability.

Should there be the possibility of an improvement in the pensioner's condition the Commission is competent to arrange for the necessary medical re-board, and to decide upon any reduction in the assessment which may be required within three years of the date of the last increase. If the medical staff is unable to forecast that the disability will decrease, it would seem then that the pensioner is entitled to the consideration that his assessment is not likely to decrease and that assessment should be stabilized accordingly.

The main justification for stabilization is to prevent financial and other disruption to the pensioner. The award of pension in itself will, in the usual case, mean that there has been some lessening in the pensioner's ability to perform physical work. In compensation for such limitations, a pension is placed in payment. Hence, the pensioner

Comment

is entitled to consider that the pension award is part of his income, and to count upon this to meet his day-to-day requirements for his standard of living. A reduction in pension which has been in payment for three years or more could seriously affect this standard. This is considered not only undesirable, but unfair, bearing in mind that the pensioner has no control over the assessment, whereas the medical staff of the Commission has.

Your Committee took note of the Commission policy in respect of World War II pensions to the effect that stabilization does not necessarily protect the interests of the pensioner in that he may not take advantage of his right to seek medical re-examination because his pension is stabilized. This, according to the Commission,* could have the result that, in a case where a condition has worsened, the pensioner and his family may suffer because the assessment was not increased accordingly.

Situations of this type could, of course, occur. At the same time, your Committee is of the opinion that most pensioners would prefer to have their pension stabilized after three years, on the understanding that they could always request a re-examination if they had reason to believe that the assessment should be increased. In fact, your Committee is of the opinion that the pensioner might be reluctant to ask for a medical re-board, if his pension were not stabilized, for fear of a decrease being ordered. The stabilization of a pension after three years would remove this fear, and the veteran would be more likely to ask for re-assessment if he considered that the condition had worsened.

* See statement of Commission policy, page 259 hereof.

Comment

Your Committee has taken note, also, of the Commission policy that the files of those suffering from pensionable conditions which are likely to worsen are reviewed at regular intervals.

World War II Pensioners

The official policy decision of the Commission to stabilize World War I pensions was approved in 1948 - some 30 years after the end of World War I. It is observed, however, that the Commission first instituted the policy of treating the World War I pension list as "more or less permanent in character" in 1936.* This occurred approximately 18 years after the end of World War I.

This decision came about, according to Brigadier Melville, "to give the soldier some assurance of the permanency of his pension".

Brigadier Melville indicated that this policy had been more-or-less in effect since 1936, even though it was not put in the form of an official instruction to the Commission until 1948.

Your Committee notes that there was stabilization as early as 1936. It has been suggested that there has been insufficient time lapse since the end of World War II to justify the adoption of a stabilization policy for pensions arising from that war. Your Committee is of the opinion that, inasmuch as there has been a lapse of 21 years since the end of World War II, it would be both practical and justifiable to effect a stabilization policy now.

Regular Force Service

Your Committee's recommendation is that there should be a stabilization policy for pensions arising from Regular Force service, with the stipulation that this stabilization should not occur until a lapse

* See statement of Brigadier J.L. Melville, page 993 hereof.

Comment

of ten years from the date of origin of the disability, or aggravation thereof. This ten year period is suggested in order to provide the Commission medical staff with an opportunity to observe the progress of the disability over a reasonable length of time -- which your Committee feels should be set at ten years. This would provide an opportunity for a disease, which is going to develop as permanent in character, to form some recognizable pattern in regard to assessment.

Progressive Conditions

The recommendations of your Committee in regard to stabilization are made on the understanding that no restriction would be placed upon the pensioner in regard to his right to request medical re-examination at any time, should he consider that his condition has deteriorated and that an assessment higher than the one which has been stabilized is warranted.

STABILIZATION OF PENSIONREFERENCES

1. Canadian Pension Commission Subject File on Stabilization, Memorandum, dated June 23rd, 1948, from the Chairman, Canadian Pension Commission to Medical Advisers of the Commission.
2. Minutes, General Meeting, Canadian Pension Commission, October 14th, 1948.
3. Proceedings of Committee Sessions, Volume I, Page D-15.
4. Ibid, Volume I, Page D-16.
5. Ibid, Volume III, Page L-146.
6. Ibid, Volume III, Page L-147.
7. Ibid, Volume IV, Page M-23.
8. Ibid, Volume IV, Page Q-9.
9. Ibid, Volume IV, Page Q-9.
10. Ibid, Volume IV, Page R-51.
11. Ibid, Volume IV, Page R-52.
12. Ibid, Volume V, Page S-13.
13. Ibid, Volume V, Page T-9.
14. Canadian Pension Commission Subject File on Stabilization, Memorandum dated February 12th, 1936, by Mr. Justice F.G. Taylor.
15. Ibid, Memorandum, dated February 22nd, 1936 by Mr. Justice F G Taylor
16. Ibid, Memorandum, dated December 12th, 1947, by Brig. J.L. Melville to Medical Advisers and Pension Medical Examiners of the Commission.
17. Minutes of Proceedings, Special Committee on Veterans Affairs, 1948, page
18. Ibid, page 67
19. Ibid, page 420
20. Ibid, page 533
21. Canadian Pension Commission Subject file of Stabilization, Memorandum, dated June 23rd, 1948 from Chairman, Canadian Pension Commission to Medical Advisers of the Commission.

CHAPTER 32DIVIDED PENSIONGENERAL

Section 18 of the Act reads as follows:

When a pensioner appears to be incapable of expending or is not expending the pension in a proper manner or is not maintaining the members of his family to whom he owes the duty of maintenance, or, in the discretion of the Commission, when a retroactive pension is awarded or a pensioner is receiving treatment or care from the Department, the Commission may direct that the pension be administered for the benefit of the pensioner or the members of his family, or the benefit of the pensioner and the members of his family, by the Commission or the Department or by some person selected by the Commission.

Under the authority of this section, where a pension is in payment to a pensioner, the Pension Commission may direct that part of the pension be paid direct to a wife if the Commission considers that the pensioner is not maintaining her, and that he owes her the duty of maintenance. Where the Commission is of the opinion that a pensioner is not maintaining other members of his family to whom he is considered to owe the duty of maintenance, the provision which permits the Commission to divide the pension also applies.

A common circumstance is that where the pensioner is living separately from his wife. The amount which the Commission will pay to a wife depends upon the financial circumstances of both the pensioner and the wife. As a general rule, the Commission will pay the amount provided under Schedule A of the Act as "additional pension" for a wife, and will use a like amount from the

General

husband's pension to make up the total amount to be paid to the wife.

The policy regarding the application of a court order in cases of this nature was dealt with by a Committee of the Commission in June, 1950. The following recommendation was approved: ¹

In cases where it is alleged the pensioner is "not maintaining members of his family to whom he owes the duty of maintenance" the Commission will require, where possible, a production of a court order, although this shall not be regarded as a "condition precedent" to continuation of additional pension to wife and/or children".

The principle of divided pension applies also in Section 34(1) of the Act which pertains to additional pension and provides for consideration as to whether a wife who does not live with and is not being maintained by a pensioner is entitled to pension.

This section reads as follows:

34.(1) When a member of the forces is married but his wife does not live with him, and is not maintained by him, the additional pension for a married member of the forces may, in the discretion of the Commission, be refused, or, if awarded, may be paid to the wife.

Interpretations of the Commission in regard to Section 34(1) are as follows:

An order of a court directing a pensioner to pay a substantial amount towards maintenance of his wife or children shall be regarded as favourable evidence in determining authorization of additional or dependants' portion of pension. Such additional pension shall not be regarded as payment in whole or in part of a Court Order. ²

Where an order of a court awards maintenance against a pensioner, such order may be regarded as prima facie evidence of entitlement to maintenance in the absence of other restricting circumstances. ²

General

As a general policy, the Commission will not pay additional pension to or on behalf of a dependant unless that dependant is being properly supported by the pensioner. This policy was adopted at a general meeting of the Commission on April 10th, 1953 as follows:⁴

The consensus of opinion among the Commission is that where the evidence fails to show that the dependant, or dependants, are being properly supported by the pensioner, additional pension should be discontinued.

This policy was amplified in a letter from Brigadier J.L. Melville, Chairman of the Commission, addressed to the Department of Veterans Affairs District Administrator, London, England, under date of May 8th, 1953. An excerpt from the letter follows:⁵

Generally speaking, it is the opinion of the Commission that if we are to award additional pension on behalf of dependants, then there must be evidence that the pensioner is contributing personally towards their maintenance. The odd dollar of his personal pension to support an appreciable award of additional pension is not considered reasonable. Therefore, when we come to consider these cases, it is necessary for the Commission to have reports representing both sides - the pensioner, and his dependants - in order that we may arrive at an equitable decision. The Commission has no thought or desire to set up as a Court of Domestic Relations, and the injured party has recourse through the established channels.

This policy was explained further in a letter to a legal firm in London, Ontario, from Mr. L.A. Mutch, Acting Chairman of the Commission, under date of September 7th, 1960, part of which read as follows:⁶

Whilst Section 34(1) of the Pension Act clothes the Commission with discretion to pay additional pension in cases where a wife is not living with or being

General

maintained by the pensioner, the practice of the Commission is to refuse to exercise its discretion in cases in which the parties are living apart and the pensioner is in a financial position to make contributions to his wife's support but neglects to do so. A wife as such has no vested interest in pension and any benefits which she may receive from additional pension flow from the entitlement granted her husband, and consequently the Commission insists that the husband fulfil his responsibilities before approving of additional pension and live up to his responsibilities whilst additional pension is in payment.

REPRESENTATIONS and EVIDENCE

There is an understandable reluctance on the part of veterans organizations to discuss publicly matters involving divided pension. Accordingly, your Committee received no direct representations from them concerning the legislation or policies of the Commission.

However, a review of the Commission's files revealed correspondence which gave an indication of the views of the Royal Canadian Legion. One case which was the subject of a report from the Commission's legal officer under date of March 23, 1961, involved a 55% pensioner. The situation is explained in the following excerpt from that report: ⁷

The situation then is that the parties separated about the year 1933. His wife secured a maintenance order, and the man requested a diversion of pension to meet his obligation. About a year and a half later the parties resumed cohabitation which would, of course, vacate the maintenance order. The man has on several occasions requested that the diversion of personal pension to his wife be discontinued and the monies paid to him and the Commission has refused all such requests. Although on one occasion he made indefinite complaints against his wife's conduct, there is no evidence to show that she is morally unworthy to receive support. It would seem that the parties have not seen each other for some 27 years although during all of this time the wife has been in receipt of a portion of his pension.

In its request which resulted in the investigation of this case, submitted to the Commission under date of December 29th, 1960, the Royal Canadian Legion gave the following explanation of its position in regard to divided pension: ⁸

We suggest that the Pension Act, as it is written, makes the primary concern of the Canadian Pension Commission the veteran and not primarily the veteran's wife nor any other dependant. In refusing then to give precedence to the veteran's needs in this case, the Commission is acting contrary to the intention of the Act. It has been stated that an adverse result might accrue to the widow if the

Representations and Evidence

husband's contribution to her during his lifetime is cancelled. This obviously is founded on the concept of "entitled to be maintained" as contained in the Act and we submit that this is a matter of law and not reasonably to be affected by an alteration in circumstances as requested. Mrs. _____'s support is directed by a court order and it is the purpose of the courts to provide the enforcement of this order which, in itself, merely enunciates the fact that she is entitled to be maintained.

In examining the circumstances of these two persons, it seems grossly unfair that the husband, who has been disabled through his service to his country, is forced to seek existence from a very meagre income and, at the same time, pay a portion of his disability pension to his wife who is living on a basis wherein her surplus of income over needs is almost equal to his total income.

The reply of the Chairman of the Commission, to the request from the Legion that no portion of the man's personal pension be paid to his separated wife, was given under date of March 29, 1961. The following excerpt is quoted: ⁹

I had a very careful survey made of all the circumstances governing the Commission's decisions with respect to this man's pension. I subsequently took the file to the Board Room and discussed it with all Commissioners available at that time. The latest decision is to the effect that in the opinion of the Commission the wife of this pensioner has not disentitled herself to maintenance by her husband. Pension is therefore divided under authority of Section 18 of the Pension Act.

Another case involved a pensioner ¹⁰ who claimed that his wife refused to live with him, and objected to the decision of the Pension Commission under which part of his pension was being paid to his wife. A representation on his behalf from the Royal Canadian Legion read, in part, as follows: ¹¹

The above-named man has asked the Legion to contact the Commission with respect to the payment of his pension which has been divided under Section 18 of the Pension Act. Mr. _____ is of the belief that the Commission has been quite unfair to him insofar as the division of pension is concerned.

Representations and Evidence

There is enclosed a statutory declaration from Mr. _____. He alleges the monies for the home in which his wife now resides were provided by him. The pensioner claims also that he offered to provide both of them with a home and all the necessities of life, which offer she refused. He believes, therefore, his responsibility for her maintenance ceased at that time. He recommended she appear before a family court judge for a legal ruling, but she did not choose to take this step. Mr. _____ concludes that the Commission is unlawfully paying a portion of his disability pension to his wife.

We do believe the Commission does when disposing of cases of this nature more often than not overlook the fact that the veteran is the one to whom pension was awarded, and not the dependents. The file indicates that there has never been a court order or separation agreement, yet the wife gains nearly the same monetary benefits on account of the disabilities suffered by the pensioner as a result of his military service.

In replying to this representation, the Chairman of the Pension Commission stated as follows:¹⁸

There are one or two points in your letter upon which I should like to comment. First of all, while it would make the Commission's work a good deal easier if a legal ruling regarding the wife's right to maintenance was provided, we have found that both the veteran and his dependents complain if we insist that such a ruling be provided before we deal with the claim. The complaint is, of course, to the effect that all veterans cannot afford to obtain such a ruling or court order. Also, the Pension Act makes it quite clear that the Commission has the right to require the pensioner to maintain the members of his family to whom he owes the duty of maintenance, if he is not already doing so. Mr. _____ should be advised that there is nothing at all illegal in the action being taken by the Commission.

I can, however, assure you that we never at any time overlook the fact that the veteran is the one to whom pension was awarded. Nevertheless, we cannot disregard Section 18. If the Pension Code that the Commission should not have the right to administer pension to anyone other than those in which the pensioner is in receipt of other treatment, and should only be permitted to divide the pension if there is a court order or separation agreement, then, of course, an amendment to the Pension Act would be required. I suggest, however, that if such an amendment were introduced, it would not be long before we found ourselves in the position of not being able to assist very deserving wives and other dependents.

HISTORY

The first provision concerning the administration of pension, where a pensioner was considered not to be maintaining the members of his family in a proper manner, was contained in Section 16 of the original Pension Act of 1919 which read as follows: ¹³

1919

16. When the Commission is of the opinion that the pensioner is incapable of expending or is not expending pension in a proper manner, or that he is not maintaining the members of his family to whom he owes the duty of maintenance, the Commission may order that the pension be paid to such person as it may appoint, in order that the money may be expended by him for the benefit of the pensioner and the members of his family. The expenses connected with such payment, if any, shall be paid by the Commission.

The relevant part of the annotation explaining the reasons for adoption of this section reads as follows: ¹⁴

This section, while it apparently gives wide power to the Commission to appoint a person to administer a pension, must not be considered as allowing of the administration of pensions indiscriminately. The pension must be paid if possible direct to the person entitled to it and that person has the right to use his or her pension in any way he or she thinks fit provided the use is not "improper". The words, "in a proper manner" must be most strictly interpreted and each case must be given special consideration. The Commission as a rule, will only be justified in administering a pension when it is being expended in so improper a manner that the pensioner, or his or her family are in danger of becoming a public charge. If the pensioner and his or her family are receiving adequate maintenance the environment or moral welfare of the pensioner must not be too closely inquired into. In cases of children, however, and their environment and moral welfare, closer scrutiny should be made and if necessary the pension should be administered when by administering it is clear that the children will have a better chance in life. A very large number of cases in which the pension is misused by the pensioner, or vice versa, will arise. It is necessary in all these cases to get both the wife's and the husband's side of the story

History

before action is to be taken for the administration of the additional pension for the wife and children. When it has been decided to pay part of the pension to the husband and part to the wife the greatest care must be exercised so that if there is a change in the amount of pension payable or if pension is discontinued, the change or discontinuation is made with reference to both the husband's and wife's shares.

This provision of the Pension Act in respect of the use of part of a pensioner's personal pension where he is considered not to be maintaining members of his family to whom he owes the duty of maintenance, has not changed materially since 1919. This section was last revised in 1946 as follows: ¹⁵

1946

Section 16. When a pensioner appears to be incapable of expending or is not expending the pension in a proper manner or is not maintaining the members of his family to whom he owes the duty of maintenance, or, in the discretion of the Commission, when a retroactive pension is awarded or a pensioner is receiving treatment or care from the Department, the Commission may direct that the pension be administered, for the benefit of the pensioner and/or the members of his family by the Commission or the Department or by some person selected by the Commission.

The first policy declaration with respect to the payment of additional pension, where a dependant was not residing with the pensioner, appeared in the minutes of a meeting of the Board of Pension Commissioners in 1918 and read as follows: ¹⁶

1918

1. IT WAS RESOLVED that the additional allowances for wife and children payable to a married member of the forces shall not be paid in any case unless:

- (a) the wife or children are living with the pensioner;
- (b) the wife or children although not living with the pensioner are being supported by him; and
- (c) when the pensioner has ceased to support his wife and children under circumstances which would justify the appointment of an administrator under Section 11 of the Pension Regulations.

History

IT WAS FURTHER RESOLVED that no additional allowance for the wife or children of a disabled member of the forces should be paid in any case when the wife or children were not being supported by the disabled member of the forces, and have not been supported by him for a reasonable period of time.

IT WAS FURTHER RESOLVED that in all cases except the case mentioned in (c) above such additional allowances should be paid direct to the pensioner.

This principle was written into the original Pension Act, and read as follows: ¹⁷

1919

31(1) When a member of the forces is married, but his wife does not live with him and is not maintained by him, the additional pension for a married member of the forces may, in the discretion of the Commission, be refused, or if awarded, may be paid to the wife.

The explanatory note concerning this section read as follows: ¹⁸

Careful investigation must be made into each such case both from the point of view of the husband as well as the wife. If the wife has deserted the husband no additional pension will be paid. As a general rule, also, no additional pension will be paid when the wife is maintaining herself and is quite capable of continuing to do so, even though her husband deserted her. Additional pension will be paid when the wife has no means of support and has been deserted by her husband.

This section is now numbered 34(1). There has been no change in the wording of the section of the Act since its inception in 1919.

It would appear that, in so far as the payment of divided pension is concerned, Sections 18 and 34 (1) are similar in one respect, i.e., they require a decision from the Commission as to whether the domestic circumstances in a family are such that part of the pension should be paid direct to a dependant. Section 34(1) is concerned only with that part identified as additional pension for a dependant. Section 18 is broader in scope, in that it permits the

History

Commission, under certain circumstances, to pay not only the amount represented by additional pension, but also part of the pensioner's basic pension, direct to a dependant.

The annotation dealing with Section 16* in the original Pension Act of 1919, was written in fairly general terms and stated that "the Commission, as a general rule, will only be justified in administering a pension when it is being expended in so improper a manner that the pensioner or his or her family are in danger of becoming a public charge." ** A further principle in the annotation states: "A very large number of cases in which the wife is deserted by the pensioner, or vice versa, will arise. It is necessary in all these cases to get both the wife and the husband's side of the story before action is taken for the administration of additional pension for the wife and children."

The annotation in connection with Section 31(1) *** was more specific and stated that no additional pension would be paid if the wife had deserted her husband, or if the wife was maintaining herself and was capable of continuing to do so even though her husband may have deserted her.

* Now Section 18

** See page 1009 hereof

*** Now Section 34

COMMITTEE RECOMMENDATIONS

(125) That the Act be amended to provide as follows:

(a) Where a dependant's right to be maintained has been established by court order the Pension Commission may divide a pension and pay part of same to a dependant where the pensioner and his dependants are living separately, and where it is apparent that the pensioner is not maintaining the dependant.

Proposed
Amendments

Court
Order
May be
Basis

(b) The Commission may pay part of a pension to a dependant where no court order is obtained if it is satisfied that the dependant is willing to submit a request to the appropriate court for a maintenance order, but that it is not practicable for her to do so.

Dependant
Must Seek
Court Order

(c) If no court order has been obtained, as in (b) above, the Commission may, in its discretion, award pension to be paid direct to the dependant, but only up to the amount provided under the Pension Act as additional pension for such dependant or other dependants in her custody.

Dependant's
Share Only
if No Court
Order

(d) If a court order has been obtained, the Commission may pay pension direct to a dependant in the amount of the court order, such amount to be made up of the full amount available under the Pension Act as additional pension for the dependant, with the balance from the pensioner's basic pension, not to exceed twice the amount of additional pension.

Dependant's
Share Plus
Amount from
Pensioner's
Up to
Court Order

(e) Where a court order is less than the total amount of additional pension payable to the dependant under the Pension Act, the Commission may, in its discretion, pay a pension direct to the dependant in excess of the court order, but in no circumstances more than the amount provided for in the Pension Act as additional pension for the dependant.

If Court
Order Less
May Pay Up
To Maximum
Dependant's
Share

(f) Where a small pension is in payment and a pensioner requests that the additional pension for a dependant, plus an equal amount from his basic pension, should be paid direct to a dependant, the Commission may act on this request without having to determine whether the pensioner pays additional monies from other sources to his dependant, as evidence that he is properly supporting her.

Pensioner
Not Required
To Pay
Dependant
From Other
Sources of
Income

Committee Recommendations

(126) That the authority to pay divided pension be removed from Section 18 of the Act and be incorporated into Section 34(1), which should be expanded to authorize payment to a dependant of part of a pensioner's basic pension, if warranted.

Divided
Pension
Under
Section 34(1)

COMMENT

The policies of the Commission regarding the provisions of Sections 18 and 34(1), as they relate to divided pension where a pensioner is deemed not to be meeting his responsibility to maintain a dependant, have been reviewed. Your Committee is sympathetic to the situation of a wife, residing separate and apart from a pensioner, where she has lived up to her obligations, but where the pensioner has not conducted himself in a responsible manner. In cases involving domestic difficulty, however, fault may lie on both sides. Coupled with this, your Committee considers that the rights to pension necessarily flow from the pensioner's service. He is the one who carries the disability and, although the agency responsible for the payment of his pension has some responsibility to ensure that it is expended properly, the requirements of a pensioner must take precedence.

Court Orders

The normal process of law, where a wife desires to enforce her right to maintenance from her husband, is through the court. Under this procedure, facilities exist for a wife to place her problem before an authority which is competent to investigate all aspects of the matter, and which has jurisdiction to decide upon any remedies which may be available under the law. Your Committee believes that the Pension Commission should not be required to take upon itself the functions of a matrimonial court. Accordingly, in all cases where the question of a dependant's right

COMMENT

to maintenance arises, the Commission should insist that, where practicable, the dependant pursue these rights through the court which exists for this purpose.

There are instances where a dependant is unable to have the matter decided by a court, or where such could be done only with delay, inconvenience or hardship. Your Committee considers that the first criterion, in a circumstance of this nature, is to decide whether the dependant is willing to take the matter before a competent court. If she is agreeable to having the matter decided in court, but cannot do so for reasons which appear satisfactory, the Commission should have discretion to award pension to her, up to the amount of additional pension provided in the Act.

There may be other instances where no competent court exists in the jurisdiction which applies, or if there is such court, legal aid facilities may be inadequate. Your Committee considers that the Commission should have discretion, in such instances, to award pensions to the dependant up to the amount of additional pension provided in the Act, without a court order. Where the Commission is deciding on cases where a court has not been involved, it should ensure that pension is paid direct to a wife only where it is abundantly clear that the pensioner owes her the duty of maintenance. If she has custody of children under 21 this should be a factor in her favour.

Court Order to Establish Maximum

Your Committee considers that where a dependant obtains a court order the Pension Commission should pay pension direct to

Comment

the dependant, but where part of the pensioner's personal pension is to be used for this purpose, the total amount should not exceed the court order, or should not exceed twice the amount of additional pension payable under the Act on behalf of the dependant, whichever is the lesser. If the amount of the court order is less than the amount payable under additional pension for the dependant, the Commission should have discretion to pay up to the full amount as represented by additional pension. The following illustrations are given in clarification:

1. If a court order is for \$50 and the additional pension for a wife is \$32, the Commission should pay \$50 of which \$32 would be provided from the additional pension for the wife and the balance of \$18 from the pensioner's basic pension. There should be no requirement for the pensioner to forego any more of his personal pension than is necessary to meet the balance required by the court order in order for him to continue to receive additional pension on behalf of his wife at the full amount provided by the Act.
2. If a court order is for \$20 and the rate of additional pension for the wife is \$32, the Commission could pay the full \$32 to her, thus making full use of the rate of additional pension for the wife.
3. If a court order is for \$100 and the rate of additional pension for the wife is \$32 the Commission should pay

Comment

a total of \$64, of which \$32 would be provided from the additional pension for the wife, and \$32 from the pensioner's basic pension. The Commission should have no responsibility to enforce the payment of the full \$100. The wife would presumably have recourse to the court to enforce the balance of the maintenance order.

Pension Commission not responsible to ensure pensioner maintaining dependants

The Commission should have no responsibility to ensure that a pensioner maintains his dependants, beyond ensuring proper expenditure of the amount provided in the Act as additional pension for a dependant, plus a like amount from the pensioner's basic pension. This basic pension belongs, as of right, to the pensioner. It is doubtful, in the view of your Committee, whether there is any justification for the Pension Commission to direct that a pensioner must use his money in a manner to which he might object. The only exception should be that the Commission should have jurisdiction to compel the pensioner to match from his personal pension, any amount which the Commission may pay out as additional pension for a dependant, up to a total amount which may be awarded as a court order, but in no case should a pensioner be forced to give up more of his personal pension than the amount of the additional pension.

It is apparently the policy of the Commission that, where a small pension is in payment and a pensioner agrees that additional pension for the wife, plus an equal amount from his personal

Comment

pension, should be paid to her, payment will be withheld unless the pensioner can show to the satisfaction of the Commission that he has accepted responsibility for maintenance, and is paying a reasonable amount from other sources to meet this responsibility. The policy of the Commission, in this respect, is presumably based on its authority in Section 18, under which the Commission may administer a pension (thus paying part of it to a dependant) if it decides that a pensioner is not maintaining the members of his family to whom he owes the duty of maintenance.

The issue, in the view of your Committee, is one of principle. Here again, the decision as to whether a pensioner is required to maintain a dependant should be that of a court; the responsibility to enforce any court order should follow the normal process of the law, and should be of no concern to the Pension Commission. If a man has earned the pension, and requests that part of this pension be paid to his wife, the Commission should be empowered to pay the pension, regardless of any circumstances arising from the domestic relations between the man and his wife. Any requirement upon the Commission to insist that a man accept due responsibility for maintenance of his dependants as a prerequisite to payment of pension to them should be removed from the Act.

Dangers inherent in pension investigations

Your Committee is concerned also that any action by the Pension Commission to make a decision regarding payment of pension based on reports obtained for that purpose may have the effect of sub-

Comment

stituting the Commission for a court of law. In illustration, the Commission might receive a report that a pensioner is not maintaining his wife. An investigation would be carried out during which both parties are interviewed. The Commission would then decide to divide the pension, or alternatively, to pay the pension to the pensioner only at the single rate. In either case, the decision may fail to satisfy one party or the other. It can be assumed that statements will have been made to the Commission which are difficult to verify. However, there would not be the same opportunity to test the credibility of either party, or of other persons who may have given opinions bearing on the issue, as there is in a court proceeding.

This, in the view of your Committee, is an unreliable procedure which could lead to unintentional harm in a delicate family situation. Accordingly, your Committee suggests that the Pension Commission require that, wherever possible, the test of whether a pensioner owes the duty of maintenance to a dependant should be decided by a court of competent jurisdiction.

Divided pension to be consolidated under Section 34(1)

As explained earlier, Section 34(1) gives the Commission discretion to award or withhold additional pension for a wife who is not living with a pensioner. Section 18 goes somewhat further than this, in that it clothes the Commission with discretion to pay part of a pensioner's basic pension to his wife, under certain circumstances.

Comment

Your Committee has recommended that the authority for the Commission to administer a pension, where it is considered that a pensioner is not expending the monies properly for dependants to whom he owes the duty of maintenance, be transferred from Section 18 to Section 34(1). This would, in effect, consolidate all discretion to pay a divided pension in one section of the Act. It would also leave Section 18 as the governing section in regard to discretion of the Commission to administer a pension in cases where a pensioner is considered incompetent to do so.

DIVIDED PENSIONREFERENCES

1. Minutes, General meeting, Canadian Pension Commission, June 27th, 1950.
2. Ibid, June 29th, 1948
3. Ibid, September 3rd, 1953.
4. Ibid, April 10th, 1953
5. Canadian Pension Commission subject file on Section 34(1)
6. Canadian Pension Commission subject file on Section 18, letter by Mr. L.A. Mutch dated September 7th, 1960.
7. Canadian Pension Commission subject file on Section 18, memorandum, dated March 23rd, 1961, by K.M. MacDonald, Commission legal officer.
8. See Committee Case file No. 1, Royal Canadian Legion letter dated December 29th, 1961.
9. See Committee Case file No. 1 Canadian Pension Commission letter dated March 29th, 1961
10. See Committee Case file No. 10
11. See Committee Case file No. 10, Royal Canadian Legion letter dated April 4th, 1967.
12. See Committee Case file No. 10, Canadian Pension Commission letter dated April 7th, 1967.
13. SC 1919, C. 43 assented to July 7th, 1919.
14. Pension Act with Annotations, July 1st, 1919.
15. SC 1946, C.62, S.13 assented to August 31st, 1946.
16. Minutes, Meeting of the Board of Pension Commissioners, September 25th, 1918.
17. SC 1919, C.43 assented to July 7th, 1919
18. Pension Act with Annotations July 1st, 1919.

CHAPTER 33
IMPROPER CONDUCT

GENERAL

Section 14 of the Pension Act reads as follows:

- 14(1) Subject to this section, a pension shall not be awarded when the death or disability of the member of the forces was due to improper conduct as herein defined.
- (2) The Commission may, when the applicant is in a dependent condition, award such pension as it deems fit in the circumstances.
- (3) The provisions of this section do not apply where the death of the member of the forces concerned occurred on service during World War I prior to the 1st day of September, 1919, or occurred on service during World War II.
- (4) In the case of venereal disease contracted prior to enlistment and aggravated during service, pension shall be awarded for the total pensionable disability existing at the time of discharge in all cases where the member of the forces saw service in a theatre of actual war, and no increase in disability after discharge is pensionable, but, if it subsequently appears upon examination, that such disability has decreased in extent, pension shall be decreased accordingly; and pension may thereafter be increased or decreased subject to the limitation hereinbefore prescribed, in accordance with the degree of disability that may be shown to exist upon any subsequent examination. R.S., c.157, s.12; 1940-41, c. 23, s. 7; 1946, c. 62, ss.5, 12.

The words "improper conduct" are defined by Section 2 (m) as follows:

"Improper conduct" includes wilful disobedience of orders, wilful self-inflicted wounding and vicious or criminal conduct;

* This Section of the Report deals with the question of improper conduct under the Pension Act, as it applies to pension applications in respect of service during World War I or World War II. Your Committee's views concerning the relationship between improper conduct and service in the Regular Forces are set out in Volume I, Chapter 12 of the Report.

General

Venereal Disease: The Pension Commission's policy concerning disability resulting from venereal disease was established at a general meeting of the Commission under date of September 3, 1948, and re-affirmed at a meeting on April 13, 1949, as follows:¹

Cases of venereal disease incurred during Service and proven by laboratory tests are governed by the provision of Section 12 (now Section 14) of the Pension Act.

Cases of urethritis, following within two weeks of admitted exposure, and which may be later complicated by sequelae of usual specific infections (for example prostatitis, arthritis, etc.) shall be considered as originating from venereal disease, even though the definite organism of such disease cannot be demonstrated.

This provision appears to mean that disability arising from venereal disease or urethritis is not pensionable, as the contracting of such disease on service is considered as improper conduct.

Alcohol and its Sequelae: Your Committee understands that it has been the policy of the Commission to refuse pension on the grounds of improper conduct where disability has arisen from the use of alcohol. In this respect your Committee noted a copy of a memorandum from the Chief Medical Adviser to the Medical Advisers of the Commission, dated May 30th, 1947, which follows:²

The question has recently arisen as to whether excessive indulgence in alcohol and any sequela arising therefrom come within the meaning of Section 12 and should be considered as due to improper conduct.

I discussed this subject with Mr. Conn, the Deputy Chairman. He referred to the definition of improper conduct and pointed out that the interpretation of this was to be left entirely to the Commission. He also pointed out that in Section 12 the only disease referred to is venereal. He stated that in any case in which alcohol is involved either as a causative factor of the condition for which entitlement is claimed or a contributing factor, the Medical Adviser in submitting the case should state the facts for the information of the Commission and the Commission will decide whether the disease or disability is due to improper conduct and whether Section 12 of the Act should be invoked.

General

Your Committee noted a number of cases where a member of the forces during wartime had been injured and the disability had been attributed to intoxication with the result that no pension was paid because of misconduct.³

Pension was granted in similar circumstances in some cases, under the provision that permits the Commission to award a pension, even though the death or disability arose from this improper conduct, where it deems that the applicant is in dependent condition.⁴

Suicide: The policy of the Commission in regard to improper conduct as it applies to suicide is set out as a guide for Commissioners in the form of a judgement of the Pension Appeal Court, under date of September 24th, 1931. This judgement is as follows:⁵

It is clear that the only ground upon which the appellant can succeed is that the deceased was insane at the time of the commission of the act which brought about his death. Otherwise, it was his own deliberate act and hence, could not, on any proper basis, be held to be attributable to war service. I appreciate that there may be opinions entertained by many people that one who has suffered greatly as a result of war service and, to end his troubles, takes his own life, although sane, should be a case for entitlement of his dependents to pension, on the assumption that such act was attributable to war service. That theory is manifestly unsound and must be condemned for many reasons, not only because it was his own deliberate act which brought about the death, but it would tend to encourage similar acts among many ex-soldiers having plausible reasons for the commission of the act, with the object of providing annuity for their wives and families at the expense of the public purse. Furthermore, on the broad ground of public policy such a theory cannot properly be entertained by any court.

This judgement is available for reference by the present members of the Commission. Therefore, it should govern the present application. It would seem from this decision that, for an application for pension arising out of a post discharge suicide to succeed, it would be necessary to establish that the suicidal act was performed during a fit of insanity, and that the insanity was directly attributable to war service, or directly connected with some incident thereof.

REPRESENTATIONS AND EVIDENCE

Royal Canadian Legion: In a prepared brief the Royal Canadian Legion stated as follows: ⁶

There are many cases in which the Pension Commission has invoked Section 14(1) to deny entitlement for venereal disease and non-specific urethritis with or without chronic prostatitis. Nevertheless these conditions are certainly not mentioned specifically in subsection (1) nor in 2(m). The only reference to venereal disease appears in Section 14(4) which refers to venereal disease contracted prior to enlistment and aggravation during service.

We do not see any basis upon which the Commission has any right to invoke Section 14(1) to deny entitlement for venereal disease and certainly there is even less basis for denying entitlement for what is described as non-specific urethritis. We might point out this latter condition is not always the result of venereal disease.

Concerning the policy of the Armed Forces the Legion stated: ⁷

We understand that it was the common practice in all units for medical officers to give lectures upon the dangers of venereal disease, the symptoms and the desirability of immediate treatment directly after exposure. It is certainly well known that in centres where many servicemen took their leave, facilities were provided for early treatment; other forms of prophylactics were also available.

We submit the policy of the Commission is restrictive and punitive, rather than "fair, large and liberal" (Interpretation Act, Section 15).

Mr. D.M. Thompson, Dominion Secretary of the Legion, stated his opinion that if an applicant had a disability arising from venereal disease and the case could not qualify under Section 14(4) (i.e., that it was a pre-enlistment disability aggravated by service) no pension could be granted. Mr. Thompson stated that this was his own view, as brought out in the following discussion:

Representations and Evidence

Mr. Thompson: I would not wish to imply by that I am saying that none have been granted.

Mr. Justice Woods: This is what I am trying to get at. Is there a hard line drawn here? If you have venereal disease and you can't come under 14(4): no pension.

Mr. Thompson: This is another one of those things that we assume a policy exists on but we do not have a copy of it

Mr. Justice Woods: No, but from the cases you have handled would you draw this conclusion?

Mr. Thompson: We would, sir, yes.

Mr. Justice Woods: In other words, you have never been successful in one under Section 14 unless you brought it under sub-Section 4; is this right?

Mr. Thompson: Yes, that is right, sir. We feel, sir, that this is a very narrow interpretation, and one that undoubtedly creates quite possibly hardship in many cases because of the narrow interpretation.

L'Association du 22ième, Inc.: Major Paul Clavel, Association Secretary, told your Committee that his Association considered that a compassionate pension under Section 25 of the Act should be granted in the following circumstance: 9

Where the member of the Forces has died and a pension has been denied by reason of misconduct under Section 14 of the Pension Act, but where such denial would result in hardship or deprivation for the widow and children.

The following discussion took place in regard to this proposal:¹⁰

Major Paul Clavel: Yes. And as for the misconduct, we suggest in that case a thorough investigation into the nature of the misconduct.. It might be of a relatively minor nature, and there is no reason why the wife should be penalized for something her husband did. In the army, sometime, we consider as a crime an act which would not be so serious in civil life, and there is no reason why--even though a misconduct for disciplinary reasons, in the army, is considered very serious - when this is studied in the light whether or not the widow should be given a pension, it is possible that this misconduct might not be quite so serious.

Representations and Evidence

Col. G.A.M. Nantel: En particulier si le soldat a eu une carrière méritoire. (Particularly if the soldier has rendered meritorious service)

Major Paul Clavel: Take for example a very good soldier who goes on a drunk and is killed or seriously wounded -- well, he was a good soldier.

Mr. Justice Woods: You should punish him but not his family.

Major Paul Clavel: Not his family, there is no reason to punish his wife, twenty years after, for this misdemeanour.

Canadian Pension Commission: Mr. T. D. Anderson, in a prepared brief presented to your Committee under date of March 21st, 1966, stated as follows: ¹¹

It must be pointed out here that the definition of "improper conduct" says that this shall "include" a number of actions which are spelled out. The Legion, of course, assumes, quite incorrectly, that everything other than those items mentioned in this definition are excluded.

The following discussion, relative to misconduct as it is applied by the Pension Commission to a disability arising from venereal disease, took place: ¹²

Mr. Justice Woods: Before leaving that, I gather from the Legion brief - it is about page 68, I believe - that there seems to be a view there that the Pension Commission seems too ready - I am putting it in my own words - to bar a man because of venereal disease. Is there any comment on this particular matter that you would like to make, or any elaboration on it?

Mr. Anderson: The Act sets forth the procedure which shall be followed in cases of venereal disease fairly clearly, and you will, perhaps, as a judge, know better than I do about this, but in legislation does not the specific invariably override the general?

Mr. Justice Woods: For the purpose of your answer we will say that it does.

Mr. Anderson: Thank you, so that I think the Commission has assumed that it must deal with venereal disease as set forth here.

Mr. Justice Woods: What section is that?

Representations and Evidence

Mr. Anderson: Section 14(4) is the section referring specifically to venereal disease.

Mr. Justice Woods: So 14(1) has no relation to venereal disease?

Mr. Anderson: I think by the interpretation we have placed upon it, yes.

Mr. Justice Woods: That is your Commission's policy, in effect?

Mr. Anderson: Yes.

Mr. Justice Woods: So it isn't really treated as misconduct?

Mr. Anderson: Well, now, I don't know that I would say that is entirely true. I think that there is an attitude or an understanding on the part of the Commission, and the very terms of Section 14(4) would seem to me to imply, that it is not condoned, in any case, it is certainly very limited.

Mr. Justice Woods: Well, I haven't analyzed section 14(4) fully, but does it say, in effect, that venereal disease may be the subject of an award where it has occurred in a theatre of actual war? Is that the gist of it?

Mr. Anderson: It says

"In the case of a venereal disease contracted prior to enlistment, pension shall be awarded for the total pensionable disability existing at the time of discharge..."

Mr. Justice Woods: Then, if it occurs under other circumstances is it viewed as improper conduct?

Mr. Anderson: I think that that has been the interpretation, yes.

Mr. Justice Woods: Now, then, what is the basis of this interpretation, then?

Mr. Anderson: Well, the fact that it is mentioned specifically in 14(4) seems to imply this because it is the only condition under which pension shall be paid. That may be an exaggeration - I don't know - but that seems to me to be the interpretation placed on it.

Mr. Justice Woods: The fact that it is mentioned specifically in 14(4), as you see it, not constituting a bar on the grounds of improper conduct would mean that, generically, in other circumstances it would?

Representations and Evidence

Mr. Anderson: Yes, that is correct.

Mr. Justice Woods: Thank you very much.

Mr. F. J. Bigg, M.P.: In a prepared brief, Mr. Bigg referred to a number of sections of the Act of which, in his view, the Pension Commission's interpretation had been "restrictive". In regard to improper conduct, he stated as follows:¹³

Section 14 reads as follows:

14(1) Subject to this Section pension shall not be awarded on the death or disability of a member of the Forces due to improper conduct as herein defined.

The definition of improper conduct is found in Section 2(m) which reads as follows:

2(m) "Improper conduct" includes wilful disobedience of orders, wilful self-inflicted wounding, and vicious or criminal conduct."

"It is submitted that the interpretation of these two provisions, taken together, leaves too much discretion in the hands of the Commission, and has resulted in denial of pension in circumstances which have created injustice. In this regard I would cite the case of the RCAF Flying Officer who was killed while flying a light aircraft."

Flying Officer X

This Flying Officer was killed on March 22, 1963, while flying a Chipmunk Aircraft. He was on duty and he was flying pursuant to military orders.

It is understood that he attempted a "roll" in this aircraft at an altitude which was considered to be too low as in regard to the aircraft's characteristics. The Canadian Pension Commission has refused pension in this case. This Flying Officer left a widow and one child who are today without pension.

The Pension Act provides that pension is payable for any accident or death arising out of or directly connected with service. It is understood that the Canadian Pension Commission has refused pension in this case on the grounds that this Flying Officer was killed while performing a loop at low altitude which was a breach of flight safety regulations.

Representations and Evidence

At the time of the accident, this Flying Officer was the Flight Leader in a group of four aircraft being ferried between Dunnville and Centralia in the Province of Ontario.

I have determined, to my own satisfaction, that had this Flying Officer successfully completed the aerial manoeuvre, he would have been given a reprimand by his superior officers, and perhaps would have been grounded for a period of time.

This is necessarily conjecture on my part, and no one can say for certain what action would have been taken, as unfortunately this Flying Officer lost his life. I have, however, discussed the case with officials who are familiar with flight safety regulations, and the consensus is that he was guilty of a minor breach of flying regulations. It is my understanding, however, that the Commission, although conceding that the death arose of, and was directly connected with service, was to refuse pension on the grounds that the manoeuvre which terminated this Flying Officer's life constituted wilful disobedience of orders.

I feel, that in this respect, I am in a position to express a personal opinion. I was, for many years, a member of the Royal Canadian Mounted Police. Also I served for seven years during the Second World War in the Canadian Army. It is a matter of common knowledge that in any military force there are literally hundreds of "standing orders" which are written for the guidance and direction of the personnel of that Force. The standing orders do form a basis of conduct for the member but, it would be completely foolish to assume that all standing orders are obeyed at all times. It would be even more ridiculous to claim that any breach of a standing order would be considered as "wilful" disobedience, using that term in its normal sense.

Another aspect of this case should be taken into consideration, particularly in relationship to the "benefit of the doubt" clause. There may be evidence in the case to indicate that this Flying Officer was executing a manoeuvre which was contrary to flying regulations. No one can say for certain, however, what was in his mind, or what actually brought about the fatal accident, bearing in mind that he was an experienced pilot, qualified to fly all types of aircraft, including jet-powered Fighters. There is still another aspect to this matter. This case raises the serious question of whether or not the Pension Act should contain a clause which denies pension for "improper conduct" when the circumstances have led to total disablement or death. I would bring to the Committee's attention, the fact that the Workmen's Compensation Regulations in most provinces provide certain restrictions where there has been misconduct or negligence, except if the injury results in permanent disability or death, in which case, compensation is paid, regardless of the circumstances which led to that injury or death.

In explaining his views in regard to the case of the Flying Officer killed on March 22nd, 1963, Mr. Bign stated as follows. 14

Representations and Evidence

If they proved that he did, in fact, wilfully loop or roll his aircraft, and not that something happened to the aircraft which made it unavoidable, but what I can gather from the evidence there was something wrong with the aircraft. They couldn't prove whether the tail had jammed or just what happened.

Now here is a man who is leader of his flight, an experienced airman, and although I know even these lads might be horsing around there is no evidence that he did, and we are depriving - we are doing here, what I would say, is the greatest punishment you can bring on any young flying officer. You are depriving his widow and children of a living, and you claim gentlemen, that this should be only done when you have done something that demanded dismissal from the service.

Now in this regard he would at least have the opportunity to support his wife and family, and not nearly as drastic as cutting their livelihood. If he broke an order certainly there should have been no question referred to you people in this regard, but in my opinion, as to whether or not he was in dereliction of his duty, well, this was not proven, and even if it were, Parliament should spell out the type of misdemeanor which would require this drastic action on the part of the Commission.

The following discussion concerning ensued.²⁵

Mr. Justice Woods: Excuse me, but this would reflect on what would be the wrong attitude on the part of the Commission in interpreting it.

Mr. Bigg: Yes, misinterpretation of the Act.

Mr. Justice Woods: I gather what you quote from the statute they weren't giving it a broad and liberal interpretation.

Mr. Bigg: I don't blame them in a way because I think the statute is badly worded.

Mr. Justice Woods: They should not be stuck with it in other words.

Mr. Bigg: Yes. As I reviewed the case this morning, I think, of course, some of these things would be unnecessary if Section 70, and other Sections of the Act were generously followed. I don't take away the responsibility of Parliament to help him as much as you can in this field.

Mr. Justice Woods: You mean the Pension Commission.

Representations and Evidence

Mr. Bigg: No Parliament to tell the Pension Commission what they think what we mean by misdemeanors, and disobeying lawful orders. I think Parliament, as a matter of fact, meant to be sensible in the wording of the Act, but as I interpret it, they list together things like self inflicted wounds, and disobedience of orders under fire. Now these are serious misdemeanors, and in old military law they might have faced the firing squad.

They are to be read together, and you would no doubt rule out neglecting to sweep out the barrack room.

Mr. Justice Woods: Or untidiness?

Mr. Bigg: Yes. Minute detail of regulations or an obscure thing about how many times he had to ponder before he crashed into another aircraft which may not have to be wilfull disobedience of orders of a criminal nature.

In ordinary law we differentiate between misdemeanors and criminal acts, and I would like that same interpretation spelled out. In other words, improper conduct can be interpreted much too widely.

Mr. Bigg provided your Committee with his general views concerning the relationship between improper conduct and pension and the following discussion is recorded

Mr. Bigg: In the Mounted Police we have a book that thick (indicating four inches) of detailed standing orders, and we are obliged, certainly by the laws and our oath of office to live by that. Of course, I can assure you I have been disciplined myself in the force, but say I forgot to turn off the ignition in a police car, and they told me the car would have burned up. Well, I don't think the Mounted Police would have made me pay for that whole car if I forgot to turn off the ignition switch. They may have fined me \$25.00 and reduced me in seniority to a sergeant or something else, but I do not think I would have been discharged from the Mounted Police or had my pension cut off. I'm only asking for common sense.

Mr. Justice Woods: If this case is illustrative in matters concerning a pension, in this particular provision, misproprietous conduct, they are demanding a very high standard of conduct, for those who obtain a pension.

Representations and Evidence

Mr. Bigg: Well, to put us on all fours, and I suggest it here, although it is not your problem that we spell this out, that breach of regulations or discipline calling for imprisonment and/or dismissal, but it would have to be that serious before I would consider stopping his widow's pension.

Mr. Justice Woods: Just a minute. Should warrant prison or dismissal?

Mr. Bigg: Breach of discipline calling for imprisonment or dismissal which is a rough criterion, but even then gentlemen I would seriously consider whether the widow should be deprived of a pension merely because of the misconduct of her husband on one occasion. The benefit of the doubt rule should be used to the extreme limit in a case like this.

Mr. Justice Woods: Behind this whole approach do I detect something of a feeling that Government Forces have some responsibility to the man's family by virtue of the fact that he is serving?

Mr. Bigg: Well, when I was in the army I was overseas four and half years and I took a flying course myself at Cambridge, and the instructor said that I didn't have the normal sense of self-preservation, and they felt this was due, in some measure, to my long absence from home. In other words, that I had, due to my service, gotten into a dangerous and reckless frame of mind.

Now then, while I was learning to fly it was just such a type of aircraft as this, and if I had brought it down too quickly in error of misjudgement I would have killed myself. Now should my widow be deprived of a pension merely because of this temporary attitude of mind which was due to service. They claimed - the medical people said that I should be watched as I had an unusual disregard for my own safety which they can only attribute to the fact of my long stay away from home, and they said I would damn well learn to fly in short order. They didn't suggest that I was suicidal, but they regarded me as not having due regard for my own safety.

I may have been breaking some regulations if I landed at 60 miles an hour instead of 50, and not paying proper attention to that would be a disobedience of an order which could be attributed, you might say, to the temporary mental state because of my service, but are you going to read into the regulation this type of thing because this is exactly what may have happened here. Section 70 alone would give this woman the benefit of the doubt.

Representations and Evidence

Now Cold Lake is in my area as well, and I am down as often as I can to see these boys fly. I think this gives me a good background for this particular case having had personal experience in the same frame of mind, and I don't consider myself a bad soldier.

Mr. Justice Woods: You mentioned, however, if I remember correctly that you feel that the widow and family should not be deprived of their pension even for one serious lapse.

Mr. Bigg: No.

Mr. Justice Woods: Well, my question --

Mr. Bigg: I question, as a matter of fact, gentlemen, I question the right to take away the pension of the widow and children for any lapse, unless contributed to by the widow and the family if he were aiding and abetting and robbing the officer's mess, but I don't think the pension should be deprived from the widow no matter what happens while he is away on active service when he left her home and went to squabble. She is still entitled to have him back on her doorstep, and just because he made some misdemeanor in France --

Mr. Justice Woods: Or even a felony.

Mr. Bigg: Even rape or murder.

Mr. Justice Woods: You feel then to go back to what you were saying.

Mr. Bigg: The widow's pension should be hers by right unless she herself has contributed to the misdemeanor or felony and so on.

Mr. Justice Woods: The Government has an obligation to the family when he joins up.

Mr. Bigg: Yes, complete obligation. As soon as he joins up the Government has complete responsibility to return this man to her doorstep or else take on the obligation of looking after these dependents. I didn't put that in the brief, but if I had thought of it I would have.

Mr. Justice Woods: I was trying to find the logical basis that you were taking, and it occurred to me this is what it was.

Representations and Evidence

Veterans' Bureau: Brigadier P.J. Reynolds, Chief Pensions Advocate, appeared before your Committee to provide the views of the Veterans' Bureau in regard to prepared questions submitted to the Bureau by your Committee. In regard to improper conduct your Committee asked for the comment of the Veterans' Bureau regarding the meaning placed upon "wilful disobedience of orders" by the Commission. Brigadier Reynolds stated as follows: ¹⁷

From past experience the Bureau feels that the Commissioners tend to consider any disobedience of orders as being improper conduct. That is, the Commissioners did not give effect to the word "wilful".

Brigadier Reynolds gave the view of the Veterans' Bureau in regard to the meaning of "vicious or criminal conduct" as follows: ¹⁸

It is my personal opinion that the word "vicious" should be given its ordinary dictionary meaning, but that criminal conduct could only be imputed after conviction for a criminal offence.

I think under the rule of "expressio unius" that that could probably be justified legally, but it is suggested that the change in attitude towards the incurrence of venereal disease in World War I and the present day attitude of society might indicate that the policy does not reflect the modern point of view.

In regard to disabilities arising from venereal disease, Brigadier Reynolds stated: ¹⁹

In the experience of the Veterans' Bureau, Commission policy in interpreting this Section is plainly that the consequence of a clear cut diagnosis of a venereal disease incurred during service is not pensionable as the incurrence of the condition during service amounts to improper conduct under Section 14. This policy no doubt stems from World War I when the incurrence of a venereal disease resulted in a stoppage of pay. This interpretation can probably be justified by the inclusion of pre-enlistment aggravation in subsection (4) and the complete absence of any reference to an incurrence (expressio unius est exclusio alterius).

Representations and Evidence

The change in attitude towards the incurrence of a venereal disease in World War II and the present day attitude of society might indicate that the policy does not reflect the modern point of view.

W.P. Power and A.D. Decker, Commissioners, Canadian Pension Commission:

Messrs Power and Decker appeared before your Committee voluntarily, in order to furnish the views of individual Commissioners. Mr. Decker referred to the provisions of the Pension Act in respect of improper conduct as related to disability arising from venereal disease and suggested as follows. ²⁰

Mr. Decker: The condition referred to - some of us feel considerable hardship is being experienced as a result of the limitations of the section to this social disease. This is 1966 and my personal suggestion is that a lot of re-thinking is necessary.

In reply to a question from Mr. Justice Woods, Mr. Power stated that he agreed with the views of Mr. Decker in this respect.

HISTORY

The original Pension Regulations, administered under the Department of Militia and Defence and approved under date of June 3rd, 1916, contained an "improper conduct" provision as follows: ²¹

1916

20. No pension or allowance should be paid to a member of the forces or any person dependent upon him when the disability or death in respect of which the claim is made was occasioned by the intemperance or improper conduct of such member, unless the Commission otherwise consent.

The definition of "improper conduct" was set out in the original Pension Act of 1919 as follows: ²²

1919

2(h) "Improper conduct" includes wilful disobedience of orders, self-inflicted wounding and vicious or criminal conduct;

The annotation explaining this definition was as follows: ²³

(h) It is to be noted that the words "improper conduct" INCLUDE wilful disobedience of orders, etc. They may mean other kinds of improper conduct such as long continued intemperance, serious negligence, use of drugs, etc., or such other conduct as might appear to the Commission to be improper. Each case, of course, would have to be considered on its merits.

The provision under which pension could be withheld for improper conduct was set out in the original Pension Act as follows: ²⁴

12. A pension shall not be awarded when the death or disability of the member of the forces was due to improper conduct as herein defined; provided that the Commission may, when the applicant is in a dependent condition, award such pension as it deems fit in the circumstances.

The annotation accompanying this section read: ²⁵

Part of the questions brought up by this Section have already been dealt with in reference to the definition of the words "improper conduct". (See Section 2(h). It was there made clear that improper conduct means improper conduct of any description, but also includes the kinds of improper conduct mentioned in the definition. When the

History

Commission has decided that there has been improper conduct it may also decide that leniency may be shown, in which case an investigation of the financial circumstances of the applicant will be necessary. Before deciding that there has been improper conduct the Commission will, of course, give the applicant the benefit of every doubt. Indeed, this is a principle which applies in all cases. The disabled sailor or soldier, or the dependents of a deceased sailor or soldier, will in all cases be entitled to the benefit of the doubt.

The improper conduct provision in the Act was amended in 1920 to preclude the refusal of pension on the grounds of misconduct if the member died on service. This amendment read as follows: ²⁶

And provided also that the provision of this section shall not apply when the death of the member of the forces concerned has occurred on service.

This amendment appears to have been effected as a direct result of a recommendation of the 1920 Special Committee of the House of Commons on Pensions and Re-establishment. This recommendation, made in a report to the House of Commons under date of June 18, 1920, was one of several made under the heading "Other proposed change in Pension Law" and read: ²⁷

Payment of pensions to dependents even though death be due to improper conduct, provided such death has occurred on service.

Representations had been submitted to the 1920 Parliamentary Committee, to the effect that it was not just to deny a pension to a widow and children for a death caused by venereal disease of a serviceman incurred on service. The Parliamentary Committee questioned whether the then-existing provision, which permitted the Commission to grant pension to an applicant for a condition where the man's death was due to venereal disease contracted during service, would cover the situation.

History

The following extract from the proceedings of that Committee is relevant.²⁸

The Chairman: Section 12 reads: -

A pension shall not be awarded when the death or disability of a member of the forces was due to improper conduct as herein defined, provided that the Commission may, when the applicant is in a dependent condition, award such pension as it deems fit in the circumstances.

And the definition of improper conduct includes wilful disobedience of orders, self-inflicted wounds, and vicious or criminal conduct.

The latter part of Section 12 should cover the case of widows and children:

Provided that the Commission may, when the applicant is in a dependent condition, award such pension as it deems fit in the circumstances.

Mr. H.B. Morphy, M.P.: How has the Board construed that clause in cases that come before it?

Asst. Medical Director, Board of Pension Commissioners:
I think you should ask the Commissioners because we do not give a decision. *

Your Committee could find no reference in the Report of the 1920 Parliamentary Committee concerning its reasons for recommending that pension be paid if the member died on service. It seems probable however, that the Committee desired that such pension be granted without application of a means test, such as would be necessary before pension could be paid under the "dependent circumstances" provision of the Section.

* It is assumed that the provision in the Act at that time for pension in cases involving misconduct was that the applicant was in dependent circumstances.

History

The effect of the 1920 amendment was really to give the widows of those who had died on service from venereal disease the same protection as other widows under the "insurance principle". An annotation presented with a later amendment (1941) states: *

Paragraph (b) in the original legislation was placed there mainly to validate and confirm awards which had already been made in respect of deaths which had occurred during service.

The Royal Commission on Pensions and Re-establishment heard complaints from veterans organizations as follows:²⁹

1. That the Pensions Board is in error in treating syphilis which originated previous to enlistment, as due to "improper conduct" which in turn is defined as including "vicious or criminal conduct".
2. That even if this construction is correct, then the Statute should be amended, so that if the origin of the infection is prior to enlistment then the right to pension should be the same as in the case of any other pre-enlistment disease.
3. The other claim is that even if syphilis comes under the ban of the Act, the Pensions Board is too strict in the exercise of its discretionary power to pay pension to applicants in a dependent condition.

The Royal Commission made the following recommendations:³⁰

1. That Section 12(1) be amended so that the prohibition there imposed shall only apply to improper conduct after enlistment; and
2. That discretion to award pensions should be exercised in case of dependency, even where the misconduct was on service.

The Royal Commission did not agree with the first complaint, to the effect that the Pension Board was in error in refusing pension for venereal disease which had originated previous to enlistment. In this respect the Commission reported:³¹

* See page 1045 hereof.

History

As to the first complaint the Commission considers that the terms of the Section are broad enough to preclude even cases where the infection took place previous to enlistment.

The other comments in the Royal Commission's report which appear pertinent at this time concern, firstly, the question of whether it was logical to deny pension for the aggravation of a disease which had been contracted prior to service and secondly, whether it was proper to deny pension when venereal disease had been contracted during the service.

The following excerpts are quoted:

1. The memorandum issued at the time the Act was passed contained no intimation that if effected a change in the law, which up to that time had made no distinction between this disease or any other which originated while the man was in civilian life. The regulation of the Pensions' Board which is now in force concerning the practice under this Section shows that what was in mind was that the section applied at least primarily to misconduct on service... The effect of the Section as construed is that the State indirectly, but no less effectively, fines not only the soldier but his dependents for an indiscretion which occurred before he took on any duty whatsoever as a soldier.³²
2. It may also be said that the provisions of Section 23(1)(b) (formerly (25)(3)) which, in effect authorized pension for pre-enlistment disability, are generous and that a case of this kind should not have the same consideration. But that section was drawn on the principle that if, on enlistment, a man was taken on as "fit" for service purposes, he was entitled to being considered as "fit" for pension purposes, and if this is the true principle it applies to the venereal disease man.³³
3. An argument always made for the man whose misconduct occurred during service is that it was really service conditions which contributed largely to his downfall, and that, while his eligibility for pensions is gone, he should not be left in want, particularly if his service has been good.³⁴

History

This Section of the Statute was re-written in 1925, and specific provision was made that in the case of venereal disease contracted prior to enlistment and aggravated during service, full pension could be awarded.

The new section read as follows:³⁵

12. A pension shall not be awarded when the death or disability of the member of the forces was due to improper conduct as herein defined; provided
 - (a) that the Commission may when the applicant is in a dependent condition, award such pension as it deems fit in the circumstances;
 - (b) that the provisions of this section shall not apply when the death of the member of the forces concerned has occurred on service prior to the coming into force of The Pension Act.
 - (c) that in the case of venereal disease contracted prior to enlistment and aggravated during service pension shall be awarded for the total disability at the time of discharge in all cases where the member of the forces saw service in a theatre of actual war, but no increase in disability after discharge shall be pensionable.

A minor amendment was made to this section of the Act in 1936 by way of clarification to the effect that the disability referred to in paragraph 12(c) was the "pensionable" disability. The annotation stated that the previous wording was ambiguous in that it did not specify that the pensioner must first have a pensionable disability following which no deduction would be made from this disability due to venereal disease contracted prior to enlistment, if the member had served in a theatre of actual war.

History

The amendments in respect of improper conduct in 1941 provided that such would not bar an applicant or a dependant from pension (where the death of a member had occurred) if the death of the pensioner had occurred in a theatre of actual war during World War II. A second provision was that if venereal disease was contracted prior to enlistment and aggravated during service, pension could be awarded for the total disability noted at the time of discharge. The stipulation was added that, if the disability subsequently decreased in extent, pension could be decreased accordingly.

1941

The amended portions are underlined in the new section 12 hereunder: 36

12(b) that the provisions of this section shall not apply when the death of the member of the forces concerned had occurred on service during the Great War prior to the first day of September, one thousand nine hundred and nineteen, or has occurred during service in a theatre of actual war during the war with the German Reich.

(c) that in the case of venereal disease contracted prior to enlistment and aggravated during service, pension shall be awarded for the total disability existing at the time of discharge in all cases where the member of the forces saw service in a theatre of actual war, and no increase in disability after discharge shall be pensionable, but, if subsequently appears upon examination that such disability has decreased in extent, pension shall be decreased accordingly, provided that pension may thereafter be increased or decreased subject to the limitation hereinbefore prescribed, in accordance with the degree of disability which may be shown to exist upon any subsequent examination.

The annotations concerning these amendments were as follows: 37

7. The only changes in these two paragraphs from those at present in the Act are indicated by the words underlined.

History

Paragraph (b) in the original legislation was placed there mainly to validate and confirm awards which had already been made in respect of deaths which had occurred during service. The amendment carried on this principle in so far as it refers to deaths which occurred "in a theatre of actual war". If the incurance principle is to be abandoned in respect of death generally on service in Canada, it might be inconsistent to maintain it in respect of deaths "in a theatre of actual war" which are due to improper conduct.

Paragraph (c) is a modification of the previous section which provided a fixed pension in respect of pre-enlistment venereal disease aggravated on service based upon the disability at the time of discharge and remaining at the same rate thereafter. The consensus of medical opinion is that this was in accordance with the medical knowledge at that time but since the last war the treatment of these diseases has so improved that in many cases disability can be removed to a great extent and therefore pension should be reduced accordingly.

It is of interest that the provision governing applications arising from service in World War II was less generous than that for World War I where the death of the member had occurred. In World War I cases, the Commission was clothed with authority to award a pension if the death occurred anywhere on service. The provision of 1941 to cover World War II cases extended this provision only if the death occurred during service in a theatre of actual war.

The revision of the Statutes of Canada, 1952, renumbered the Section dealing with improper conduct from 12 (a)(b) and (c) to 14 (1)(2)(3) and (4). No change was made in the intent.

The provision for pension arising from the death of a member in respect of World War II cases was amended in 1957 with the object of placing World War II applications on the same basis as World War I.

The amended section of the Act read: 38

History

- 14(3) The provisions of this section do not apply where the death of the member of the forces concerned occurred on service during World War I prior to the 1st day of September, 1919, or occurred on service during World War II.

The annotation concerning this amendment read as follows: ”

This amendment places dependents of members of the forces who served in World War II in a comparable position with dependents of those who served in World War I.

No further amendments in the provisions of the Act regarding improper conduct have been made to date.

COMMITTEE RECOMMENDATIONS

(127) That the Act be amended to provide that the provisions of the improper conduct section not apply where the member of the Forces has suffered total disablement, assessed at 100% or greater, and that this provision be retroactive, subject to the principles enunciated in Recommendations numbered 116 to 122* dealing with retroactive awards.

Improper Conduct
Not to Apply
if Member
Totally Disabled

(128) That the Act be amended to provide that death or disability arising from venereal disease contracted during service be not considered as due to improper conduct within the meaning of the Pension Act.

Venereal Disease
Not to be
Considered as
Improper Conduct
Under Pension
Act

* Pages 972 and 973 hereof.

COMMENTTotal Disablement

Your Committee has recommended * that where a member of the Regular Forces is totally disabled or killed, full pension should be payable if the death is related to service, regardless of whether misconduct was involved. In effect this would extend the existing provisions, as they apply to those who served in World War I and World War II, to members of the Regular Force in peacetime where the death of a member occurs and misconduct is involved.

Your Committee's recommendation in Chapter 12 regarding the Regular Forces goes one step further, and suggests that the same provision should exist if the member becomes totally disabled. Your Committee proposes that the extension of this coverage for total disablement should apply also in regard to World War I and World War II. A recommendation to this effect is made herein.

The recommendation that improper conduct not be a bar to pension if the member suffers total disablement is advanced in keeping with your Committee's view that pensionability for members of the Armed Forces should be not less generous than that which exists for employees of the Federal Government under the Government Employees Compensation Act. This Act provides, in general terms, that persons employed by the Federal Government are entitled to Workmen's Compensation benefits in a similar manner as conferred by Workmen's Compensation legislation in the province in which the employee is usually employed.

Your Committee's views in regard to the proposal that coverage under the Pension Act should be similar to Workmen's Compensation legislation in Canada are set out in Chapter 12 dealing with pension for the Regular Forces.

 * See Recommendation No. 61(e), Volume II, Chapter 12, page 460

Comment

The recommendation that pension be not denied on grounds of improper conduct, in cases of total disablement arising from service in World War I and World War II, should have retroactive effect, but where pension is approved, the limitation of five years as proposed in this Report would normally apply.

Your Committee is aware that, particularly in respect of World War I cases, the effect of the implementation of this recommendation would be far reaching. There would not, however, be many cases involved from World War I and it is assumed that, even from World War II service, the number of cases of total disablement where pension was not paid due to improper conduct are relatively few.

Regardless of administrative or other difficulties which may be involved, your Committee considers that there is no justification to withhold pension for improper conduct, where the applicant has suffered total disablement.

Since 1920, the Pension Act has contained the principle that if the member lost his life while serving in wartime, pension would not be denied the widow on the grounds of improper conduct. Your Committee considers that should the member become totally disabled, pension coverage should be no less generous; and that this provision should apply to service both during World Wars I and II and in the Regular Forces.

Venereal Disease

Your Committee notes the policy of the Pension Commission to the effect that the contracting of venereal disease during service is considered as improper conduct in the meaning of the Pension Act. The definition in the Act is that "improper conduct" includes "wilful disobedience of orders, wilful self-inflicted wounding and vicious

Comment

or criminal conduct". The wording of this definition does not necessarily limit the type of improper conduct to that specified in the definition. Accordingly the Commission, under its powers of interpretation, has followed the policy of looking upon the contracting of venereal disease as improper conduct. It is arguable, however, whether such was the intent of the framers of the original legislation.

The annotations in the 1919 Act in respect to improper conduct contain no reference to venereal disease. They do specifically refer to the effects of the consumption of alcohol. This is understandable, inasmuch as intoxication is an offence in the Armed Forces and would be considered as "wilful disobedience of orders". There are, however, no prohibitions in Armed Forces ordinances concerning relations with members of the opposite sex and, although the contracting of venereal disease was a matter resulting in deduction of pay during both World War I and World War II, the contagion would not, in itself, have come about by reason of any wilful disobedience of orders or other acknowledged form of improper conduct, as a general rule.

It may be helpful to study this matter in the light of the Commission's policy on pregnancy of women members of the Armed Forces. In this regard, your Committee makes reference to a memorandum on the Commission policy file regarding improper conduct as quoted hereunder: 40

With reference to your inquiry, I have checked with the Air Force (and believe that the Army and Navy situation would be the same). There is no order which would preclude a member of the forces (including Women's Divisions) from having sexual intercourse.

Periodically members are given lectures in the prevention of venereal disease and are told that the best way to insure freedom from such disease is to avoid having sexual intercourse.

Comment

There is no order to suggest that a female member of the forces should take any steps to prevent her from becoming pregnant. Presumably, as in civilian cases, such a suggestion would be against public interests. When a female member becomes pregnant she receives an honourable discharge and is entitled to rehabilitation and other benefits (including treatment for pregnancy under certain circumstances).

It would appear, therefore, that an irregular act of sexual intercourse on the part of a member of the forces would not be deemed misconduct by the various services, nor would a woman who became pregnant be considered as having contravened any military order. It is due to her pregnancy that she is discharged and the fact that she receives an honourable discharge appears to speak for itself. In civil life, I suppose it would be considered a moral offence, not a civil one.

It would be of interest to note that special provision has been given for treatment care after discharge under certain circumstances and that the discharge is shown as one "for other than medical reasons" unless there are other conditions which establish medical unfitness.

Your Committee took note of the provisions of the United States legislation in regard to ~~improper conduct~~. This provision is as follows: 41

105. The line of duty and misconduct:

- (a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in the line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval or air service, whether on active duty or on authorized leave, unless such injury or disease was the result of his own wilful misconduct. Venereal disease shall not be presumed to be due to wilful misconduct if the person in service complies with the regulations of the appropriate service department requiring him to report and receive treatment for such disease.

The relevant reference in the legislation for war pensions in the United Kingdom is as follows: 42

Comment

39. Serious Negligence and Misconduct: If the disablement or death of a member was caused, or contributed to, by his own serious negligence or misconduct, any award in respect of that disablement or death may be reduced, withheld or cancelled.

The instructions issued by the British Ministry of Pensions concerning venereal disease are: ⁴³

Venereal disease should normally be rejected. It is only in very exceptional circumstances that the disease or its sequelae may be regarded as caused or influenced by service.

A few cases have been known of genuinely accidental infection of doctors, nurses or orderlies attending venereal patients, but they are exceedingly rare. These include extra-genital chancre in syphilis and gonorrhoeal ophthalmia when no genital infection is present. Such cases, in the absence of negligence, may be accepted as attributable to service.

Aneurysm of the aorta and syphilitic disease of the nervous system, e.g. G.P.I. and locomotor ataxia, are examples of late syphilitic manifestations and may, in exceptional circumstances, be aggravated by prolonged stress and strain of service.

The Canadian Armed Forces operated an active educational program for its personnel in regard to the prevention of venereal diseases. Also, members were, on request, provided with prophylactics and the medical services provided immediate treatment facilities on a twenty-four hour basis to a member who felt he may have been exposed and required preventive treatment.

Your Committee believes that some allowances should be made, in the Pension Act, for the fact that military service usually takes a member from his home environment - often at an early age. This creates certain unnatural circumstances for him and he can hardly be blamed if he encounters difficulties which might well not have arisen had he continued to live in the civilian surroundings with which he was familiar.

Comment

His conduct is the foreseeable result of the disruption associated with the assembly of large bodies of servicemen in unfamiliar surroundings. He was not prohibited from associating with the opposite sex. In other words, the circumstances which could lead to infection from venereal disease were not considered, in the Armed Forces, as an offence in the same sense as was intoxication, improper handling of fire arms and other acts of wilful disobedience.

In fact, having been exposed to lectures warning him of the dangers of infection of venereal disease, and having been told of the availability of prophylactics and of the steps he should take if he thought that he had been exposed to the dangers of this infection, the serviceman could hardly have concluded that there was any military regulation against his having relations with members of the opposite sex. Also, if it was the intention to bar him from the benefits of the Pension Act, should he suffer a disability as a result of this infection, information to this effect should have been promulgated to him through official sources while in the services. Your Committee was unable to find any evidence that this was done.

Your Committee took note, also, of the comments of two of the Commissioners who appeared before it, who volunteered the suggestion that the policy of the Commission in regard to venereal disease should be re-examined.* Your Committee inferred from these comments that, at least in the view of two of the Commissioners, the policy of the Commission in regard to venereal disease should be modernized. Your Committee is in full accord with this view.

* See page 1037 hereof.

Comment

Mr. T.D. Anderson, Commission Chairman, gave his views concerning the limitation imposed upon the Commission by the specific wording of Section 14(4) of the Act in regard to venereal disease. He suggested in his evidence * that the Commission was required to consider that the specific reference to Section 14(4) to conditions under which pension could be paid for a disability arising from venereal disease barred the Commission from paying pension for venereal disease under any other circumstances. Section 14(4) states that pension shall be paid for the total pensionable disability arising from venereal disease, where such is of pre-enlistment origin and has been aggravated during service. Mr. Anderson suggested that the "specific overrides the general" and that, because a specific condition is laid down in the legislation, the Commission would not be empowered to award pension in other circumstances.

In other words, Section 14(4) of the Act sets down certain conditions under which pension can be paid for venereal disease, and specifies that the disease has to be of pre-enlistment origin. Mr. Anderson interpreted this to mean that disability arising from venereal disease could be pensionable only if the disease was of pre-enlistment origin and that, because legislation was specific in this instance, the Commission was barred from awarding pension in more general circumstances including that of disability arising from venereal disease incurred during service.

If this interpretation is correct the result is highly undesirable and the legislation should be amended accordingly. The Pension Act should provide coverage where the disability arose from venereal disease contracted during service, as well as before.

* See page 1028 hereof.

Comment

Under Section 14(4) of the Act, as it now stands, the Commission can pay a pension for disability arising from the disease which was entirely of pre-enlistment origin, provided the member served in a theatre of actual war. The rationale of this provision is understandable. In the first place, the Commission could hardly penalize a man for improper conduct in connection with a pre-enlistment contagion. Secondly, if that man was physically able to serve in a theatre of actual war, and his pre-enlistment condition arising from venereal disease was aggravated during service, his entitlement should be the same as any other member of the Forces who suffered an aggravation of pre-enlistment condition, and who served in a theatre of actual war. That is to say, the Commission makes no differentiation because the pre-enlistment condition of the former happened to be the result of venereal disease. This is as it should be.

Having accepted the responsibility to pay pension for an aggravation of a pre-enlistment condition of venereal disease, your Committee questions whether it is reasonable for the Government to refuse pension for a disability where the disease was incurred during service. It is realized that in the case of the pre-enlistment disease the exposure was at a time when the individual's conduct was of no concern to the military authorities and the aggravation presumably came about by reason of the stress and strain of service conditions, rather than of his conduct. In the case of venereal disease contracted during service, the question of the individual's conduct does arise but, in view of the tolerant attitude of the authorities to the matter of relations with the opposite sex there is even more reason to provide for personnel who contracted the disease while in service.

Comment

The provision in the United States legislation to the effect that the member must have complied with the regulations of the service in regard to the reporting and receiving of treatment for the disease should be taken into account when consideration is being given to any application by the Canadian Pension Commission. It is the view of your Committee that this could be done, during the process of adjudication, through application of the general intent of the section. That is to say, the claim based on venereal disease itself should not be barred but where a member has refused to report or receive treatment for the disease the Commission could well consider such as an act of improper conduct and, if necessary, pension could be refused under these circumstances.

Urethritis

The Royal Canadian Legion was critical of the policy of the Commission under which urethritis, following within two weeks of admitted exposure, was considered as originating from venereal disease. The question of whether urethritis, in any given case, could be considered as the sequelae of venereal disease would presumably depend upon medical investigation. Your Committee does note the Commission policy which provides that urethritis shall be considered as originating from venereal disease "even though the definite organism of such disease cannot be demonstrated". * In the absence of specific knowledge on the question, your Committee cannot comment on this policy.

Your Committee makes no suggestion as to whether urethritis should be classified as venereal disease. However, the recommendation made

* See page 1024 hereof.

Comment

herein, to the effect that venereal disease should not be considered as improper conduct, would resolve the difficulties which presumably have arisen from the Pension Commission's current interpretation to the effect that urethritis following within two weeks of admitted exposure can be classified as a venereal disease in respect of matters under the Pension Act.

IMPROPER CONDUCTREFERENCES

1. Minutes, General Meetings, Canadian Pension Commission, November 2nd, 1948 and April 13th, 1949.
2. Canadian Pension Commission Subject File on Improper Conduct, Memorandum from Chief Medical Adviser to Medical Advisers, May 30th, 1947.
3. Committee Case File No. 9.
4. Pension Act, Section 14(2) (formerly Section 12(a))
5. Committee Case File No. 8.
6. Proceedings of Committee Sessions, Volume III, Page L-112.
7. Ibid, Volume III, Page L-113.
8. Ibid, Volume III, Page L-114.
9. Ibid, Volume IV, Page Q-12.
10. Ibid, Volume IV, Page Q-13.
11. Ibid, Volume IV, Page R-36.
12. Ibid, Volume IV, Page R-36.
13. Ibid, Volume V, Page Y-12.
14. Ibid, Volume V, Page Y-13.
15. Ibid, Volume V, Page Y-14.
16. Ibid, Volume V, Pages Y-15, 16 and 17.
17. Ibid, Volume VI, Page KK-26.
18. Ibid, Volume VI, Page KK-27.
19. Ibid, Volume VI, Page KK-27.
20. Ibid, Volume VII, Page MM-60.
21. Order in Council, PC 1334, dated June 3rd, 1916.
22. SC. 1919, C.43 assented to July 7th, 1919.
23. Pension Act with Annotations, July 1st, 1919.
24. SC. 1919, C.43 assented to July 7th, 1919.
25. Pension Act with Annotations, July 1st, 1919.
26. SC. C.62, s.4 assented to July 1st, 1920.
27. Report, Special Parliamentary Committee on Pensions and Re-establishment, 1920, Page 10.
28. Proceedings, Special Parliamentary Committee on Pensions and Re-establishment, 1920, Page 216.
29. Report, Royal Commission on Pensions and Re-establishment 1923-24, Sessional Paper 203, Page 11.
30. Ibid, Page 13.
31. Ibid, Page 11.
32. Ibid, Page 11.
33. Ibid, Page 12.
34. Ibid, Page 13.
35. SC. 1925, C.49, s.2, assented to June 27th, 1925.
36. SC. 1941, C.23, s.7, assented to June 14th, 1941.
37. Bill 17 as passed by the House of Commons, May 28th, 1941, Page 6.
38. SC. 1957, C.19, s.6, assented to December 20th, 1957.
39. Bill 35 as passed by the House of Commons, December 19th, 1957, Page 2.
40. Canadian Pension Commission Subject File on Improper Conduct, Memorandum dated September 29th, 1944, by H.W. Nichol, Reviewer, Canadian Pension Commission.
41. TITLE 38, United States Code (Veterans Benefits) Section 105, Page 7.
42. Section 39, Royal Warrant, May 8th, 1947.
43. Provided by T.M. Lloyd, British Ministry of Social Security, Ottawa, in a letter to your Committee.

CHAPTER 34NEWFOUNDLAND VETERANSGENERAL

Under the terms of union with Newfoundland the Canadian Government agreed, in general terms, to assume responsibility for the payment of benefits to Newfoundland veterans on the same basis as to Canadian veterans. Section 38(b) of the Union of Newfoundland Act provided as follows:¹

- 38(b) Canada will assume as from the date of Union the Newfoundland pension liability in respect of the First World War, and in respect of the Second World War Canada will assume as from the date of Union the cost of supplementing disability and dependants' pensions paid by the Government of the United Kingdom or an Allied country to Newfoundland veterans up to the level of the Canadian rates of pensions, and, in addition, Canada will pay pensions arising from disabilities that are pensionable under Canadian law but not pensionable either under the laws of the United Kingdom or under the laws of an Allied country.

To give effect to the benefits set forth in the terms of union, provision was made in the Statute Law Amendment (Newfoundland) Act as follows:²

- 20(1) For the purposes of sections forty-five, forty-six and forty-six A of the Pension Act, chapter one hundred and fifty-seven of the Revised Statutes of Canada, 1927, domicile in Newfoundland shall be deemed to be domicile in Canada.
- (2) A member of the naval or military forces of Newfoundland in World War I or World War II shall be deemed to be a member of the forces for the purposes of section eleven of the Pension Act.
- (3) A British subject resident and domiciled in Newfoundland at the time of enlistment who served in the naval, military or air forces of any of the countries allied with His Majesty during World War II shall be deemed to be a member of the forces for the purposes of section eleven of the Pension Act if the disability in respect of which the application for pension is made is not pensionable by virtue of subsection one or two of this section.

General

Section 13 of the Canadian Pension Act was amended³ accordingly by insertion of the following subsections:*

- (5) For the purposes of Sections 50, 51 and 52, domicile in Newfoundland shall be deemed to be domicile in Canada.
- (6) A member of the naval or military forces of Newfoundland in World War I or World War II shall be deemed to be a member of the forces for the purposes of this section.
- (7) A British subject resident and domiciled in Newfoundland at the time of enlistment who served in the naval, army or air forces of His Majesty or in any of the naval, army or air forces of any of the countries allied with His Majesty during World War II shall be deemed to be a member of the forces for the purposes of this section, if the disability in respect of which the application is made is not pensionable by virtue of subsection (5) or (6).

The action taken by the Canadian Pension Commission to fulfill the obligations accepted by Canada, under the terms of union in respect of the various types of cases referred to in the agreements above, is summarized below:

World War I

1. Members and dependants of members of the Royal Newfoundland Regiment and members and dependants of members of the Newfoundland Forestry Corps were accorded all of the benefits of the Pension Act to which a member of the Canadian Forces was entitled.
2. Members of the British or Allied Forces who were domiciled in Newfoundland on August 4, 1914, and had been pensioned by the Government of the country with whose forces they served were granted supplementation of such pension to Canadian rates and the pensions of the dependants of such members were also supplemented to Canadian rates.

World War II

1. Members of the Newfoundland Regiment and dependants of such members were accorded all of the benefits of the Pension Act to which a member of the Canadian Forces was entitled.

* Sections were renumbered from 45, 46 and 46A to 50, 51 and 52 respectively.

General

2. Men domiciled in Newfoundland as at September 1, 1939, who served in the British or Allied forces and were awarded pension as a result of such service had their pensions supplemented to Canadian rates. The pensions of dependants of such members were supplemented to Canadian rates.
3. British subjects resident and domiciled in Newfoundland at the time of their enlistment who had served with the British or Allied forces and had had an application for pension disallowed by the appropriate authorities of the country with whose forces they served could make application direct to the Commission for consideration under the Pension Act and consideration was given such claims.

Great War Veterans Association, Compassionate Grants

At the time of Union the Government of Canada took over the responsibility for all pension payments being made by the Board of Pension Commissioners for Newfoundland. Among these were a group who were being provided for as compassionate cases through a G.W.V.A. Patriotic Fund, which received a yearly grant from the Newfoundland Government. These were all taken care of by Canada under a special appropriation until such time as satisfactory arrangements had been completed for their maintenance under other auspices.

REPRESENTATIONS AND EVIDENCE

Mr. C.W. Carter, M.P.: * Mr. Carter made representations in regard to two matters affecting Newfoundland veterans. The first concerned the fact that Newfoundland veterans could apply for consideration under the Canadian Pension Act, but that the Pension Commission would entertain an application in these circumstances only after application had been made to the British Government, and such had been refused. The second concerned a small group of veterans or dependants who could not qualify under the terms of the British legislation, but who, because of extenuating circumstances, had been in receipt of a special form of pension from the Newfoundland Commission Government. Mr. Carter informed your Committee that the Canadian Pension Commission had accepted responsibility to pay pension to this group at the rate of payment in effect from the Newfoundland Government at the time of union and that no increase in these rates had been approved by the Canadian Pension Commission subsequent to union.

In a prepared brief, Mr. Carter stated as follows:

Application of Pension Act to Newfoundland Veterans.

1. The principle to be followed in applying the Pension Act to Newfoundland Veterans is clearly set forth in Section 38 of the "terms of Union" as follows:

"Canada will make available to Newfoundland Veterans the following benefits on the same basis as they are from time to time available to Canadian Veterans, as if the Newfoundland Veterans had served in His Majesty's Canadian Forces."

2. These benefits are then set forth in subsections headed as follows:

- (a) War Veterans Allowance
- (b) Disability Pensions
- (c) Veterans Land Act

* Now Senator C. W. Carter

Representations and Evidence

- (d) Re-establishment Credits
- (e) Educational & Vocational Training
- (f) Rehabilitation

3. The general principle outlined in (1) above is strictly adhered to in all of the subsections listed above with the exception of (b) relating to disability pensions.

Subsection (b) merely undertakes to supplement up to the Canadian Level the pensions paid by the United Kingdom Government to Newfoundland veterans of World War II.

Thus, instead of being regarded as Canadians who "had served in His Majesty's Canadian Forces," as set forth in the preamble to Section 38 (and applied in the other five subsections) Subsection (b) puts the Newfoundland World War II Veteran in the category of Canadian who served in the United Kingdom Forces.

4. As a result of this departure from the general principle set forth above, Newfoundland veterans seeking disability pensions must follow the following procedure.
- (a) First apply to British Ministry of Pensions in England.
 - (b) If claim is rejected by B.M.P. then apply to Canadian Pension Commission.
 - (c) If successful, apply to Canadian Pension Commission for supplementation.
 - (d) If claim rejected by the Canadian Pension Commission, then he can appeal the decision of the British Ministry of Pensions or request renewal hearings by the Canadian Pension Commission leading to a hearing by an appeal Board of the Canadian Pension Commission.

In 1943 -- and I would like to point out it was before Newfoundland became part of Canada that this procedure was established -- in 1943 an agreement was signed between the Governments of the United Kingdom and Canada with respect to members of the R.C.A.F. (graduates of the British Commonwealth Air Training Plan) who served as individuals with the R.A.F. units and formations.

This is comparable to the Newfoundland veterans of World War II who served in Newfoundland units that were recruited in Newfoundland and composed solely of Newfoundlanders (Canadians) and were consequently different from Newfoundlanders or Canadians who bypassed their own forces to join United Kingdom units.

Representations and Evidence

Under the agreement referred to above the initial award is made by the Canadian Pension Commission and paid by the Canadian Treasury. The claims are then sent to the British Ministry of Pensions who reimburse the Canadian Pension Commission for the amount of award they -- that is, the British Ministry of Pensions -- would have made.

This is in no way contrary to the policy of subsection (b) of Term 38 -- the section which the Pension Commission has based their interpretation on -- and it does not measure up to the full application of the general principle of Term 38, yet it is more in line with that part of it which reads "on the same basis as they are from time to time available to Canadian Veterans".

I would like to point out that the Terms of Union not only set forth their status, which says that they should be treated as though they have served with the Canadian Forces, but that the benefits should be made available on the same basis as they are set from time to time available to Canadian Veterans; so even if they chose the narrower interpretation they should have been given them on the same basis as they have given them to these R.C.A.F. personnel who served with the R.A.F.

This is a matter of procedure only, and one that would speed up the adjudication of claims of Newfoundland World War II veterans. Since this agreement was in effect when Newfoundland became a part of Canada in 1949, it is my opinion that pensions claims of Newfoundland World War II veterans should have been governed by this arrangement rather than by the procedures followed to date.

In support of his suggestion Mr. Carter expressed the opinion that the Canadian Pension Commission, in interpreting its own legislation, could have adopted the procedure of permitting the Newfoundland veteran to make his application to the Canadian authorities first, and then apply to the British authorities for any supplementation under their legislation. His explanation was as follows: ⁵

Now in this problem of the Newfoundland veterans there is a clear contradiction in the terms set forth in the Union.

Representations and Evidence

The Pension Commission, as I understand it, are the sole-interpreters of the Act; they can interpret it any way they like; and this particular wording gave them the opportunity of two separate interpretations. They could have interpreted the principle in the clear terms as stated in the original preamble to the Terms of Union, which is the spirit governing the whole agreement. They chose to interpret it in narrower terms as set forth in the subsection.

Well, that was their prerogative to interpret it in one way or the other, but I still think that they could, if they had wished to do it, have interpreted it in the broader sense as set out in the preamble; and I think they could also have brought to the attention of the authorities this contradiction which stands out very clearly because it is so different from all the other sections or subsections set forth in the Terms of Union.

The principle is that Newfoundland veterans should be treated as though they had served in Her Majesty's Canadian Forces; in other words, they were to be treated as though they were Canadians who had served the Canadian Forces. That was the general principle and this principle was strictly adhered to in all of the other pieces of legislation under the Veterans Charter except the Pension Act.

In regard to the group of special pensioners previously being paid by the Newfoundland Commission Government, Mr. Carter stated as follows:

This is a very small group, probably less than twenty including individuals and dependents. These people were awarded pensions by the Newfoundland Government prior to 1949. Many of these were awarded any time after 1940, 1942 right up to 1949.

Examination of their files revealed they would not be able to qualify for pensions under the existing Canadian legislation.

Mr. Justice Woods: Can you just give us any illustration of why they wouldn't qualify? What type of qualification had these people --

Mr. Carter: Well, I think some of these would be people whose -- who served in the militia, or would be people who had served in the rescue tug service, or who had been in the merchant navy, and their dependents, but they were all special cases which the Newfoundland Government had felt were deserving of a pension.

Representations and Evidence

We didn't have a Pension Act at that time. As you know, we didn't have a democratic government at that time; we had a Commission; and they made up their laws from day to day as they went along. Apparently they had gone into these cases and found that because of their war service they and their dependents were entitled to a pension.

The Canadian Government took over this group.

Mr. Justice Woods: Saying "Since you are paying those pensions we will pay the pensions too," in other words?

Mr. Carter: Yes, they said "we will pay it at the existing rate."

Mr. Justice Woods: Yes; this comes in your next paragraph.

Mr. Carter: Yes. The Canadian Government undertook to pay these pensions at the existing rate.

This is nearly 17 years ago and the cost of living has more than doubled since some of these awards were made, so that these payments which remain unchanged are hopelessly inadequate with resultant deprivation and hardship.

This is the point, really, of putting this in -- not only to bring it to your attention, but to show that the Pension Commission could have taken some action even if it didn't pay a pension....

Mr. Justice Woods: May I ask you, in No. 3 there... "the Canadian Government undertook to pay these pensions at the existing rate"... what was the nature of the undertaking, Mr. Carter?

Mr. Carter: Well, that is all I have been able to find out. This is not really covered in the Terms of Union. It all depends how you interpret this Term of Union, whether it was meant to cover this group or not; and I don't really know.

Mr. Justice Woods: You don't know if there was anything that would tie it down?

Mr. Carter: No.

Mr. Justice Woods: You have sought this, have you?

Mr. Carter: Yes, I have tried, and I have tried to get information. I haven't tried, perhaps, as much as I should have from the St. John's office. But seeing they were pensioners it does raise the question whether they were covered by Term 38 of the Terms of Union which was meant to cover all pensioners in Newfoundland, or whether this special group was to be treated differently.

Representations and Evidence

But there, again, comes the problem of "existing rate"--- whether you interpret "existing rate" as being the 1949 rate or the existing rate as it is from time to time.

Mr. Justice Woods: Yes, I can see the problem of whether the "existing rate" meant one that was to be fixed, or whether the "existing rate" meant that they were to have the same rates with the other people under.....

Mr. Carter: Whatever change, they would have the benefit of... whatever change would take place; one normally would assume that. This particular ruling has caused this particular group untold hardship. I know that from personal experience.

Mr. Justice Woods: When the Canadian Government undertook to pay these pensions at the existing rate these, presumably, were to be paid by the Canadian Pension Commission?

Mr. Carter: Yes.

Mr. Justice Woods: But you, I assume, would have no knowledge of what instructions they were given?

Mr. Carter: No.

Mr. Justice Woods: Or how it was turned over to them?

Mr. Carter: So far as I have been able to find out that that was the only instruction they had; but as I point out in paragraph 5 the Pension Commission had discretion to set discretionary levels of maximum income as a formula whereby pensions are awarded to dependent parents. It is my opinion that these discretionary powers are broad enough to enable the Commission to make a broad interpretation of the phrase "existing rate" rather than limiting it to its narrowest interpretation as the 1949 rate.

If not, it had a clear duty to bring this situation to the attention of Parliament and seek whatever powers were necessary. As the numbers are so small, the amount of expenditure involved is insignificant.

Canadian Pension Commission: Mr. T.D. Anderson, in an appearance before your Committee under date of March 25, 1966, stated as follows: 7

In Mr. Carter's submission, he made reference to Section 36 and it might be useful to you to have an excerpt from the terms implied, particularly to that section of the agreement. I have therefore, taken the liberty to prepare this and let it go on the record.

Representations and Evidence

Section 38

Canada will make available to Newfoundland veterans the following benefits, on the same basis as they are from time to time available to Canadian veterans, as if the Newfoundland veteran had served in His Majesty's Canadian Forces, namely ---

Now there is a little bit more to that preamble, but does not effect the issue particularly. This, as you will notice, is a general statement and dealing specifically on the basis of pension. We go down to item (b).

Canada will assume as from the date of Union the Newfoundland pension liability in respect of the First World War, and in respect of the Second World War Canada will assume as from the date of Union the cost of supplementing disability and dependents' pensions paid by the Government of the United Kingdom or an Allied country to Newfoundland veterans up to the level of Canadian rates of pensions ---

Now this is all we are obligated to do with regard to World War II pensions under the terms of the Union.

The preamble of Section 38 reads:

On the same basis as they are from time to time available to Canadian veterans, as if the Newfoundland veterans had served in His Majesty's Canadian Forces.

Now bearing that preamble in mind, he should not be treated as serving in the allied forces, he should be treated exactly as Canadians are. As I mentioned the other day, and as I say, you gentlemen know more about this than I do, but in law the specific overrides the general, and the specific is set out in (b) below. There it does say that we shall only supplement these pensions.

Mr. Anderson stated that Newfoundland veterans were looked upon, under the Canadian Pension Act, as if they were Canadians who had joined the United Kingdom Forces.

Concerning the group of special pensioners referred to by Mr. Carter, Mr. Anderson stated:

Representations and Evidence

Of course, there is nothing we can do about that. These people with whom he spoke in that particular section, it is our submission that those people could not be paid a pension under the terms of our Pension Act..... It was agreed that whatever pension was paid them at the time of confederation would be paid them at that rate, and it is a firm agreement.

HISTORY

In an appendix to a letter from the Prime Minister of Canada to the Governor of Newfoundland dated October 29th, 1947, the proposed arrangement concerning coverage for veterans was set out as follows:

1947

Canada will extend to Newfoundland veterans who served with any of His Majesty's Forces the following benefits on the same basis as if these Newfoundland veterans had served in His Majesty's Canadian Forces.

- (a) Disability and Dependents' Pensions as follows:
Canada will assume the Newfoundland pension liability arising from World War I, and for World War II will assume the cost of supplementing disability and dependents' pensions paid by the United Kingdom or Allied Governments to Newfoundland veterans up to the level of Canadian rates of pensions, and in addition, will pay pensions arising from "disabilities which are pensionable under Canadian law, but which are not pensionable under United Kingdom law;"

Under date of January 25th, 1949, the Chairman of the Canadian Pension Commission wrote to the Minister of Veterans Affairs stating that "as the terms of union are general, it is desirable that there should be on record a very clear understanding regarding agreements which were reached during discussion with the Newfoundland delegation and accepted by the Government". This letter outlined the terms as follows:

1949Terms of Union Cl. 381/ World War IPensions

Canada will assume as from the date of union the Newfoundland pension liability in respect of the First World War' is intended to mean that, subject to the Pension Act,:

- (a) From the date of Union Canada will take over all Newfoundland awards and pay at Canadian rates,
(b) Supplement any British or Allied awards to Canadian rates,

History

- (c) Where no corresponding legislation is contained in the Pension Act, as in the case of 'Merchant Seamen, V.A.D.'s, etc.', who in Newfoundland qualified as 'members of the forces', provision will be made in the Estimates, or Appropriations, whereby Canada will continue the present awards until expiry, but accept no new ones on the same basis.
- (d) Consider any new applications which may arise from former members of the Newfoundland forces on the basis that the injury or disease or aggravation resulting in disability or death was incurred during service. In other words, extend the benefits of the so-called 'Insurance Principle'.

2/ World War IIPensions

Subject to the provisions of the Pension Act:

- (a) Supplement British and Allied awards to Canadian rates.
- (b) Take over and pay all Newfoundland awards at Canadian rates.

This provision is for the Newfoundland Regiment who were mobilized and served as a Home Guard corresponding to the Veterans Guard in Canada.

- (c) Make provision whereby a number of compassionate awards, made on the recommendation of the G.W.V.A. of Newfoundland, will be continued in payment until they can be transferred to their proper Canadian category. No new ones will be added thereto after Union.
- (d) Consider any applications which may arise on the basis of the Insurance Principle, provided the claim must, in the first instance, have been adjudicated upon by the country with which service was rendered.

The Chairman of the Commission received a letter from the Minister under date of October 9th, 1949, stating that he concurred in the memorandum and stating that "it sets out the understandings which were reached during discussion with the Newfoundland delegation, and which were accepted by that delegation and by the Canadian Government."

History

The Act to approve the terms of union with Newfoundland received Royal assent on February 18th, 1949. Section 38 made provision for extension of the Pension Act to Newfoundland veterans. There have been no legislative changes in regard to this arrangement since that time.

COMMITTEE RECOMMENDATIONS

(129) That applications from or on behalf of Newfoundland veterans continue to be processed on the basis that the Canadian Pension Commission shall entertain an application after it has been considered by the Ministry of Social Security of the British Government; and that the applicant be extended the assistance of the Canadian Pension Commission and the Department of Veterans Affairs, including the Veterans' Bureau, in the preparation of his application to the British Ministry; and that the Pension Commission take steps as may be possible to minimize delay where a claim is submitted for decision under the Canadian Pension Act.

Application
Be Considered
First by
British
Pension
Authority;
Applicant to
Be Assisted
DVA and CPC

(130) That, where after two years, it is not possible for the British Ministry of Social Security to process the claim of a Newfoundland veteran due to loss of documents the Canadian Pension Commission should proceed to consider the claim as if the applicant's service had been in the Canadian Forces.

Pension
Commission
To Act if
British
Ministry
Unable to
Process Cla

(131) That the rates paid to the special group of pensioners who are in receipt of pension from the Newfoundland Commission Government, the payment of whose pension was accepted by the Canadian Government following the union with Newfoundland, be subject to the same comparative increases as the basic rate of pension under the Canadian Pension Act; and that the effect of this recommendation be retroactive.

Increases
To Apply
To Special
Group

COMMENT

Your Committee believes that the intent in regard to the terms under which Newfoundland veterans were brought within the purview of the Canadian Pension Act is clearly demonstrated in the letter from the Chairman of the Pension Commission to the Minister of Veterans Affairs under date of January 25, 1949. *

There has been a provision in the Canadian Pension Act since its inception for the payment of supplementary pensions to those who were domiciled in Canada at the outbreak of war who served with the forces of the United Kingdom. The principle was that pensions awarded by the United Kingdom would be increased up to the amount of the Canadian pension which would have been paid had the member died or been disabled while serving in the Canadian Forces. The letter from the Chairman of the Commission to the Minister makes it amply clear that, in his understanding, the principle in the Terms of Union was to the effect that Newfoundland veterans would be accorded the same pension rights as Canadian veterans who served in the forces of the United Kingdom. This placed Newfoundland veterans under the provisions for supplementary pension already in effect for those Canadians who served with the British Forces. In the absence of specific direction in the Act to the contrary, your Committee considers that the Pension Commission could have drawn no other conclusion.

Your Committee considers that whatever the intent of the Terms of Union with Newfoundland, the provisions have worked out satisfactorily for the veterans of that Province, in the sense that they are accorded the same pension coverage as Canadians who served in the British Forces. If the British Government grants pension, the Canadian Government supplements that pension up to Canadian rates.

* See page 1070 hereof.

Comment

If the British Government does not grant pension, an application will be considered, to determine whether the disability or death is pensionable under Canadian pension legislation even though an award could not be made under the British law.

So far as your Committee can see, this system gives the Newfoundland applicant the advantages which may be available to him in both pension systems. In the circumstance where a pension is granted by the British authorities, the Canadian Pension Commission must supplement that pension, even though there could be some doubt as to whether the application would qualify in the first instance under Canadian law. Conversely, if the British authorities refuse this pension, the Newfoundland veteran still has an opportunity of having his case considered under the provisions of the Canadian Act.

The only conceivable drawback in this procedure could be that of delay. In this respect, your Committee has seen fit to recommend that the facilities of the Pension Commission, and of the Department of Veterans Affairs, including the Veterans' Bureau, be placed at the disposal of the Newfoundland applicant, should he require them in order to prepare his application for submission to the British Ministry of Social Security. This should not be construed as a criticism concerning the arrangements now in force. It is the understanding of your Committee that the British authorities make considerable use of Pension Commission staff and of the Department of Veterans Affairs, including the Pensions Advocates and Medical Consultants. There may, however, be some merit in making official mention in this report concerning the requirement for these services. Your Committee suggests that, if there is a need to place these arrangements on a more formal basis than at present, this should be done in order to ensure

Comment

that the Newfoundland veteran has a full understanding of his rights in the matter.

As a matter of information it seems doubtful, in the view of your Committee, whether a procedure which would permit the Newfoundland veteran to apply in the first instance to the Canadian Pension Commission would be workable.

It must be borne in mind that, in these cases, the member's service was with the British Forces. His records are held in the United Kingdom and, in most instances, the investigation and research regarding the case has to be done in that country by representatives of the British Ministry. In view of this, the realistic course seems to be for the British authorities to make their decisions in the first instance, following which the Canadian Pension Commission can approve supplementation if the British claim is awarded, or can consider a primary award under the Canadian Act if no pension can be paid by the United Kingdom Government.

Delay Due to Loss of Documents

It is understood by your Committee that there have been a small number of cases where the British Ministry of Social Security has not been able to process the claim of a Newfoundland veteran due to loss of documents. In such instance, the Canadian Pension Commission should be empowered to proceed with the claim without the necessity of his having to obtain an adjudication from the British Ministry of Social Security. The essential requirement in a case of this nature should be a certification that the applicant served in the Newfoundland Forces and is thus eligible under the Canadian Pension Act. If his documents have become lost, he should be entitled to the benefit of the doubt which has long been a provision in the Canadian Pension Act.

CommentSpecial Newfoundland Pensioners

Your Committee has examined the documents which relate to this special group of persons who were in receipt of pensions under the Newfoundland Commission Government, and whose pensions became the responsibility of the Canadian Pension Commission. In your Committee's view, there is nothing to be gained now by attempting to decide the original intent. So far as your Committee has been able to determine, it was never clearly stated whether the purpose was to take over the payment of these pensions at the existing rate, and continue them in payment at that rate, or whether, alternatively, the use of the word "existing" was meant to describe only the rate which would exist at the time of take-over, and that these rates could be increased subsequently, in the same manner as the basic rate of pension.

It has been necessary, in this instance, for your Committee to fall back on one of the basic principles governing pensions for death or disability arising from military service, which is that the rates are adjusted from time to time in accordance with economic factors. Your Committee considers, therefore, that in the absence of any specific terms to govern these pensions, the recipients should be accorded the same treatment as other pensioners under the Pension Act.

Your Committee has recommended not only that the rates for any such pensioners should be increased in the same degree as the basic rate of pension, but that the effect of the recommendation should be retroactive to the date of union. If your Committee's recommendation that these pensions should be increased in the same manner as the basic rate of pension is sound, then it is justifiable that any such increases be back-dated and any recipients, having been deprived of benefits of these increases in the past, should now have the use of the monies which would have been paid to them had the rates been increased in scale with general pension increases under the Act.

NEWFOUNDLAND VETERANSREFERENCES

1. SC. 1949, C.1, s.38(b), assented to February 18th, 1949.
2. SC. 1949, C.6, s20, assented to March 25th, 1949.
3. RSC 1952, Chapter 207.
4. Proceedings of Committee Sessions, Volume IV, Page 0-2.
5. Ibid, Volume IV, Page 0-2.
6. Ibid, Volume IV, Page 0-7.
7. Ibid, Volume V, Page AA-1.
8. Ibid, Volume V, Page AA-2.
9. Canadian Pension Commission Subject File on Newfoundland Veterans.
10. Ibid.
11. Ibid.
12. SC. 1949, C.1, s.38, assented to February 18th, 1949.

CHAPTER 35DUTIES OF CHAIRMAN, DEPUTY CHAIRMANCOMMISSIONERS AND STAFF OF THECANADIAN PENSION COMMISSIONGENERAL

Section 3, sub-sections 1, 2, 3, 6, 13, and 14 read as follows:

- (1) There shall be a Commission to be known as the Canadian Pension Commission, which, subject to the provisions of this Act, has and shall exercise all powers, authorities and functions that immediately prior to the 1st day of October 1933, were vested in and exercisable by the Board of Pension Commissioners for Canada.
- (2) The Commission shall consist of not less than eight Commissioners, who shall be appointed by the Governor-in-Council, but, in his discretion, the number of Commissioners may be increased to twelve.
- (3) The Governor-in-Council may, from time to time, appoint not more than five additional ad hoc Commissioners, if and as required, for the purpose of considering and adjudicating upon applications for pension, and each ad hoc Commissioner shall be appointed for a period not in excess of one year, but the provisions of sub-section (10) shall apply to an ad hoc Commissioner.
- (6) The Governor-in-Council shall appoint one of the Commissioners to be Chairman and another of the Commissioners to be Deputy Chairman of the Commission.
- (13) The Chairman of the Commission has the rank and the powers of a deputy head of a department for the purposes of this Act and has control and direction over the disposition of and duties to be performed by the other Commissioners and control over the duties to be performed by such staff as may be assigned to the Commission by the Department.
- (14) In case of the absence of the Chairman or his inability to act, the Deputy Chairman shall exercise the powers of the Chairman for him or in his stead, and in such case, all regulations, orders and other documents signed by the Deputy Chairman have the like force and effect as if signed by the Chairman.

General

These subsections provide for the constitution of the Canadian Pension Commission consisting of up to 17 Commissioners, of whom five may be appointed on an ad hoc basis, one of whom shall be appointed as Chairman, and another as Deputy Chairman.

The composition of the Canadian Pension Commission, at March 1st, 1967, was as follows:

Chairman	T. D. Anderson
Deputy Chairman	J. M. Forman
Commissioners	J. R. Painchaud
	S. G. Mooney
	U. Blier
	D. G. Decker
	M. T. Nixon
	W. H. Flatt
	M. J. Power
	M. A. Gilmour
	M. H. Pyke
Ad hoc Commissioners	R. N. [unclear]
	J. M. Cameron
	G. C. Thompson
	L. W. Brown
	[unclear] [unclear]

General

The duties of the Chairman, Deputy Chairman and Commissioners are as follows:

CHAIRMAN

The Chairman of the Commission has the powers of a deputy head of a department for the purposes of the Pension Act, and has control and jurisdiction over the disposition of and duties to be performed by the staff of the Commission.

DEPUTY CHAIRMAN

In absence of the Chairman, the Deputy Chairman exercises all the powers of the Chairman. When acting for the Chairman all regulations, orders and other documents signed by the Deputy Chairman have like force and effect as if signed by the Chairman.

When the Chairman deems it necessary for the speedy and convenient despatch of business, he may in writing, delegate to the Deputy Chairman the performance of any of the duties imposed upon him under the Pension Act and his discharge of such duties has like force and effect as if performed by the Chairman. The Deputy Chairman has, at present, the responsibility of arranging all Appeal Board sessions. This responsibility has been delegated to him by the Chairman.

GeneralCOMMISSIONERS

Members of the Commission are solely occupied in the matters of adjudication upon all types of claims arising under the Pension Act, and the Civilian War Pensions and Allowances Act and other like claims over which the Commission has jurisdiction.

While in Ottawa, the Commissioners study individual entitlement claims and prepare decisions thereon. They deal also with dependant's claims of all kinds and make decisions thereon in accordance with the provisions of the Pension Act.

Two Appeal Boards, constituted so far as possible of a doctor, a lawyer and a lay person, are almost constantly absent from Ottawa hearing appeals at principal centres throughout Canada. Not infrequently, three such boards are on the road. When sitting in appeal, members of the Commission in effect constitute a separate tribunal and have final jurisdiction over the case under appeal.

All Commissioners including those with medical and legal training are first of all members of the Commission with precisely the same duties as any other Commissioner. Specific medical advice is provided by the Medical Advisers and specific legal advice is provided by the Pension Counsel. Nevertheless, when claims involving complicated medical problems are dealt with, such claims are invariably discussed with a medical Commissioner before they are completed. Likewise, claims involving legal questions are discussed with legally-trained Commissioners before a decision is reached.

General

Your Committee noted that no specific duties were provided in the Act for the Commission Chairman, except to state that he has the powers of a deputy head of a department. The Chairman, acting with one or more Commissioners, can exercise and perform the powers, authorities and functions vested in the Commission in accordance with Section 7(4) which states that the Commission shall consist of two or more Commissioners. Under this section the Chairman does participate in decision-making in regard to applications for certain types of discretionary benefits under the Act. The Chairman does not, by tradition, sit on Appeal Boards, which, in accordance with Section 62(1), consist of three members of the Commission.

The Chairman does not issue or give direction in regard to interpretations of the Act. The procedure, when an interpretation is required, is for the Commission as a whole to decide on such interpretation and it is assumed that the Chairman would vote in such matter only in the case of a tie. Interpretations, once decided, are not promulgated on any regular basis but are, upon occasion, issued in the form of directives to Pension Commission staff.

The Chairman is under no specific instruction concerning the issue of advice, or training instructions for the Commissioners, or Commission staff, and in so far as your Committee was able to determine, has not done so. This should not be construed as a criticism of the Chairman, as the traditions of his office have not included his undertaking activities of this nature.

COMMITTEE RECOMMENDATIONS

Commissioners
Need Not be
Professional
Men; Some
Should be
Representative
of Veterans and
Armed Forces

(132) That, in making appointments to the Commission, an attempt be made to obtain a reasonable number of professionally-trained personnel, including medical doctors, lawyers, and social welfare workers, but that the policy of establishing a quota of approximately one-third medical doctors, one-third lawyers, and one-third laymen be discontinued; also, an attempt be made to staff the Commission with a reasonable number of persons who could be considered as representative of the interests of veterans and members and ex-members of the Armed Forces.

Appointment on
Recommendation
of Commission
Chairman.

(133) That Commissioners be appointed by the Governor-in-Council on recommendation of the Chairman of the Canadian Pension Commission.

Chairman to
have control
of Staff

(134) That Section 3(13) be amended to provide that the Chairman of the Commission shall have control and direction over the disposition of staff assigned to the Commission by the Department.

Quality
Control
System

(135) That the Chairman of the Pension Commission be responsible to develop and operate the following quality control systems within the Commission:

(a) a review of decisions made by Senior Pension Medical Examiners and officials of the Claims and Review Branch in regard to discretionary benefits. (See Recommendation No. 58*).

District and
Head Office
Staff Decisions

* See Volume I, Chapter 11, page 421.

COMMITTEE RECOMMENDATIONS

(b) a review of the decisions made by Commissioners in regard to entitlement claims, by examinations of the documentation dealing with pension claims including the statement of case, the transcript of examiner's hearings and entitlement board hearings, the submissions on behalf of applicants and the decisions of Commissioners.

Entitlement
Decisions by
Commissioners

(c) a review of the decisions made by the Claims and Review Branch and the Commissioners in regard to discretionary benefits by means of a spot check of cases and an examination of the transcript in regard to personal appearances under Section 7(3) of the Act.

Discretionary
Decisions by
Commissioners

(136) That the Chairman of the Pension Commission take such steps as may be deemed necessary to ensure the maximum standardization of adjudication within the terms of the legislation, and that, in this respect, the following be instituted:

Measures
to Ensure
Standard-
ization

(a) a filing system be established to record a digest of relevant comments and decisions which would be of value to Commissioners and decision-making staff in achieving familiarity with accepted policies.

Digest of
Comments

(b) memoranda be issued to Commissioners, or staff members on an individual case basis, where any of the quality control procedures have indicated variance with Commission standards.

Memoranda
to be Issued
For Guidance
of
Commissioners

(c) general directives be issued where the Chairman considers such are required in regard to policies or procedures, with the stipulation that where interpretation is required, such be ascertained by the Chairman in any manner consistent with the Act and the policy of the Commission.

Directives
be Issued

(137) That the Act be amended to provide that Commissioners, except an ad hoc Commissioner, not require re-appointment at ten year intervals, but any Commissioner, including an ad hoc Commissioner, may be removed for cause by the Governor-in-Council.

Commissioners
to Have Life
Appointment
to Age 70
Not Require
Re-Appointment
Every Ten
Years

COMMENTAppointment to Commission

Sub-sections (2) and (3) of Section 3 provide that the regular Commissioners and ad hoc Commissioners shall be appointed by the Governor-in-Council. Your Committee considers that such appointments should be made on the recommendation of the Chairman of the Commission.

The adjudication and administration of pensions for disability and death arising out of military service is a matter of importance. Your Committee considers that the selection of personnel to serve as Commissioners is essential to the effective operation of this agency in the government service. It would appear, in your Committee's view, that if the Chairman is given the responsibility for nomination of candidates for appointment to the Commission, he could undertake a recruiting and staff development programme which would ensure an adequate and continuing source of supply of qualified persons. For example, he could set out acceptable specifications for the job of Commissioner. He could maintain a list of possible candidates who could be approached if a vacancy occurred, or was about to occur. He could conduct interviews with potential candidates and determine their suitability for the employment.

The Chairman, under this proposal, would have to support any recommendation for the appointment in the form of a written report for consideration of the Governor-in-Council. This report would necessarily have to state the nominee's qualifications. Hence, the Chairman could recommend only those persons who appear to be qualified for the appointment.

Commissioners with medical or legal training

Your Committee has recommended elsewhere in this report that the practice under which Appeal Boards are composed, so far as possible, of a medical doctor, a lawyer and a layman be discontinued. Your Committee concurs in the idea that

COMMENT

a reasonable number of persons with medical and legal training should be included in the composition of the Commission to ensure the availability of expert knowledge and opinion at the level of adjudication. Notwithstanding, the Commissioner, while acting in the role of adjudication, applies his experience and judgement on a general basis and must not permit his professional training to be the sole factor in governing his decision.

Your Committee considers, as well, that some Commissioners should be selected for their general suitability as being representative of the layman's viewpoint. Experience in the veterans field, or in a related type of work in the Armed Forces, would provide a useful background for a potential member of the Commission.

The present policy is to appoint to the Commission persons with qualifying service in the Armed Forces in wartime. Your Committee views this as commendable but does not feel that such service would necessarily qualify them as having any particular knowledge of the problems of veterans or of members and ex-members of the Regular Forces. Your Committee considers that some representation in this regard is essential. For example, Commissioners might be recruited from among personnel of the Department of Veterans Affairs who have gained long and valuable experience in the administration of veterans legislation. Similarly, personnel might be recruited from the officers and staff of veterans organizations. As a third example, a person with long service in the Regular Forces would presumably be in a position to contribute much as a Commissioner, in view of his familiarity with the problems of service and ex-service personnel.

COMMENT

The pension system in Canada differs somewhat from most other countries, in that the Veterans' Bureau has been created specifically to assist the applicant in the establishment of his pension claim. In Great Britain and the United States this role is normally carried out by ex-servicemen's or veterans organizations.

The veterans organizations in Canada do, of course, render considerable assistance in pension claims, and often work in conjunction with the Veterans' Bureau. It is evident, however, that because of the existence of the Veterans' Bureau, the role of veterans organizations in the presentation of pension claims has been different in Canada from most other countries.

In the United States the basic law of veterans benefits provides for recognition of veterans organizations in the preparation, presentation and prosecution of claims under laws administered by the veterans administration. Mr. William J. Driver, Administrator, United States Veterans Administration, stated in an article published by the World Veterans Federation, as follows: ¹

Representatives of the major veterans organizations are to be found at each of the 67 Veterans Administration Offices which perform the adjudicating function. Appeals from decisions of these agencies of original jurisdiction are to the Board of Veterans Appeals in Washington, D.C. The accredited service organization representatives perform materially the same role in representing claimants before both the original and appellate agencies.

A claimant, selecting a representative, may be assured that he has engaged a skilled advocate who would assist in the proper completion of the application, ensure that necessary evidence is assembled, counsel him as to the possibilities, check on the status of the claim from time to time, and follow it through the adjudication procedure to its conclusion.

COMMENT

The service officers in American veterans organizations must be accredited by the Veterans Administration before they can engage in the presentation of the claims. The accreditation program includes "on the job training" in a Veterans Administration office for a period of one year, to enable these officers to receive practical experience and guidance in the presentation of claims.

Speaking of their role, Mr. Driver states: ²

Long training and experience will have taught the representative the facts to be emphasized, the legal points to be presented, the contentions and arguments to be made, and the most effective vehicle to be utilized... Thus they provide a true service, a significant contribution to speedy and just decisions.

In the United Kingdom the British Pensions Appeals Tribunals Act of 1943 established tribunals to hear appeals from decisions from the Ministry of Pensions. These tribunals are independent of the Minister and consist of a chairman with legal training, a medical doctor, and a member who has served in the armed forces. These members are appointed by ex-service associations and they assist applicants at the initial and appellant stages in the presentation of their claims.

Your Committee considers that the system in Canada, which makes use of a special bureau of Government for the presentation of claims, is best suited to the circumstances here. Your Committee considers also that many veterans organizations play a most effective role in the presentation of claims and the relationship which exists between the Veterans' Bureau and the veterans organizations is a constructive one which should, if at all possible, be maintained.

COMMENT

Your Committee considers that, notwithstanding the role played by veterans organizations in the advancement of pension claims, there is a need also to ensure that the Commission personnel should include persons who have been chosen specifically for their demonstrated ability to deal with the problems of veterans, service and ex-service personnel. To this end, a number of Commission vacancies should be allocated for appointment of persons who are experienced in matters which are material to the well-being of veterans, service personnel, and former members of the service.

In recommending that the Commission be comprised partly of persons with this type of experience, your Committee has taken into consideration the unique aspects of the Pension Act. The administration of pensions requires a certain knowledge of medicine and of law. Your Committee considers that another element - perhaps more difficult to define - is the necessity for an appreciation of the unique character of the Pension Act, in that it conveys benefits on a basis which has been described partly as a mark of gratitude, partly in payment of a debt and partly to provide subsistence. * One effective means of achieving pension standards which are commensurate with these principles, in the view of your Committee, would be the appointment of representatives of veterans and ex-servicemen to the Commission.

Control of Staff

Section 3 (13) provides that the Chairman of the Commission shall have control and direction over the disposition of the duties to be

* See Volume II, Chapter 13, page 487 dealing with Basic Rate.

COMMENT

performed by the Commissioner, but limits his jurisdiction in regard to staff assigned from the Department of Veterans Affairs to control over their duties.

This seems to mean that, although the Chairman has responsibility for control and direction in regard to the disposition of a Commissioner, his responsibility in regard to the staff is limited to that of assigning and supervising their duties. The result is that the Chairman of the Commission must work with such staff as are assigned to him by the Department. Should the Department desire to provide him with a staff member whom for any reason he might consider undesirable, he would have to accept the member should the Department insist. The Department would also have authority to transfer any staff member of the Commission without prior approval of the Chairman of the Commission.

Your Committee considers that the independence of the Commissioner is an essential element in its administration. The Chairman of the Commission should have full and unrestricted powers in regard to the assignment of staff, and to their disposition within his organization. The Chairman, by virtue of Section 3(13), has the rank and powers of a deputy head of a department in the Government. In this respect your Committee considers that he should have the same responsibility in regard to staff as deputy heads, and that his staff requirements should be within the control of the Chairman, subject of course, to the authority of the Governor-in-Council and the Treasury Board as required.

COMMENTQuality Control

The Act states, in Section 3(13), that the Chairman has control and direction over the duties performed by Commissioners. So far as your Committee was able to determine, the Chairman exercises his responsibility in regard to the quality of performance of his Commissioners on the basis of his day-to-day contact with the work of the Commission. Your Committee proposes that specific quality control systems be required, particularly if its recommendations are accepted concerning the delegation of decision-making powers to Commission staff. Your Committee's recommendations concerning the expansion of personal appearances under Section 7(3) of the Act, and the adoption of the new system for Appeal Boards (proposed Entitlement Boards), would contribute to the need for more adequate measures of quality control in regard to the disposition of entitlement and other claims.

Your Committee has made a second recommendation which goes hand-in-hand with that concerning quality control. This is to the effect that the Chairman, in order to ensure maximum standardization of adjudication, should institute a number of special procedures.

The first of these is a system to record a digest of relative comments and decisions. This would not represent a system of case law precedents, but it would provide, for the individual Commissioner, a ready reference through which he could determine Commission thinking on the basis of past decisions.

The second is the institution of a system of memoranda to be issued to Commissioners or staff members on an individual case basis. This

COMMENT

would commit, to writing, the views of the Chairman, where he is of the opinion that a decision was at variance with Commission standards.

A third suggestion concerns the issue of general directives, in accordance with recommendation No. 101 of this Report, regarding the preparation and promulgation of policies dealing with pension law, medical advice and administration.

The responsibilities for quality and standardization, in the view of your Committee, belong properly to the Commission Chairman. The recommendation does not state specifically that the responsibility should be written into the Act, but, if there is any question whether the Chairman actually has the right to institute and develop these measures, it would be as well to provide legislative authority for him to do so.

Tenure of Appointment

Section 3, subsections (8)(9) and (10) of the Act provide that a Commissioner, except an ad hoc Commissioner, shall be appointed for a period of ten years and upon expiry of his term of office, if not disqualified by age, shall be eligible for re-appointment.

Your Committee considers that the principle of making these appointments for a ten year period only should be discontinued. The Commissioner appointed on other than an ad hoc basis, should be able to consider his employment as being in the nature of a career. This is hardly possible if he must concern himself with the question of whether his appointment will be renewed at the end of each ten year period. Security of tenure is necessary to independence of mind.

COMMENT

The position of the Chairman must be one of leadership and co-ordination. Individual Commissioners, in their day-to-day work, tend to lead their own lives. Each will make his own contribution because of his particular background and training. The benefit of having Commissioners with a variety of backgrounds will not be fully realized unless there is direction and leadership of a nature that will make the best use of their collective resources. Each Commissioner must, of course, make his own decisions on each case. However, if this is done without a background of effective co-operation, collaboration, exchange of ideas and understanding with his fellow Commissioners, the results will not reflect his full capacity as a member of a selected and responsible group.

References

1. The Annals of Comparative Legislation, published by the World Veterans Federation, Volume 9, December 1962, page 183
2. Ibid, page 183

CHAPTER 36POSTHUMOUS ASSESSMENTGENERAL

In this Section the term "posthumous assessment" is used to describe the process under which the Pension Commission may give a ruling after the death of a pensioner or pension applicant, regarding the extent of the disability which existed in him prior to his death. Posthumous assessment is sometimes referred to in the Medical Advisory Branch of the Commission as a "life-time ruling after death".

A posthumous assessment is usually sought to determine whether pension of 48% or more would have been in payment, had the former member of the Forces not died. If the rate was 48% or greater, a widow would be entitled to pension in the same manner as if the member's death was attributable to service.

It should be made clear that, in so far as your Committee is concerned, the purpose of a posthumous assessment should not be to determine whether a higher rate of pension could be paid on a retroactive basis, thus creating a liability against the Crown to pay monies to the estate of the deceased pensioner. The purpose should be restricted to determining a widow's rights to pension.

The benefit to a widow in regard to an assessment of 48% or greater at time of death lies in the provision of Section 36(3) of the Act.* This provides that, if the former member of the Forces dies, and was in receipt of a pension of 48% or greater, the widow may qualify for pension

Reference herein to the situation of a widow under Section 36 (3) shall apply also to a dependent child in respect of Section 26 (7), which provides that pension shall be payable to such child on the death of a pensioner where a pension was in payment of 48% or more in the same manner as if the death had been attributable to service.

General

in the same manner as if the member had died on service, or his death was attributable to service. The relevant section of the Act is quoted below:

- 36(3) Except as otherwise provided in this Act, the widow of a member of the Forces who was, at the time of his death, in receipt of a pension in any of the classes from one to eleven, inclusive, mentioned in Schedule A, or who died while on the strength of the Department for treatment and, but for his death, would have been in receipt of pension at the rate so provided for any of those classes, is entitled to a pension as if the member had died on service whether his death was attributable to his service or not.

Review of Assessment

It is the long-standing policy of the Commission that, following the death of a pensioner or a pension applicant, the Commission cannot review an assessment. This policy is set out in a letter, dated October 22nd, 1953, to the Chief Medical Adviser from which the following is quoted:

The Commission adheres to the long-standing policy that review of assessment cannot be made following death, and therefore, the Medical Adviser is not in a position to submit an 865 * recommending increased assessment unless there was actual examination and assessment prior to death.

This policy was the subject of clarification at a general meeting of the Commission on September 11, 1952. The following decision is quoted from the Minutes of that meeting:²

- (1) At no time has the principle requiring that pension be in effect in Classes 1 to 11 (where death results from other than the pensionable condition), before the widow may benefit under the provisions of Section 32(2) been departed from, with the exception of the "long term treatment cases" * contemplated by the 1948 amendment.
- (2) There is no provision in the Pension Act which authorizes the Commission to review and change assessment following death for purposes of Section 32(2).

 Form 865 sets out the description of
 District Pension Medical Examiners.
 See Explanation, page 1013, para 1.

GeneralAssessment where entitlement ruling given but applicant died before being assessed

The policy of the Pension Commission will permit a posthumous assessment where entitlement has been approved by the Commission and the applicant dies prior to being assessed, provided there are adequate medical reports available for examination. This policy was set out at a general meeting of the Commission on September 4, 1958 as follows:³

When following consideration of a lifetime claim, entitlement is conceded by the Commission from a date prior to that of death, the Commission may assess the degree of disability for the new condition, provided such can be established from reports completed by competent medical authority prior to death.

Initial Assessment

It is the established policy of the Commission, also, that a disability cannot be assessed after death. This restriction is set out in a letter to the Chief Pensions Advocate from the Chairman of the Canadian Pension Commission under date of November 22nd, 1952. Part of this letter is quoted hereunder:⁴

The Commission cannot assess disability after death, but there are a few cases wherein special consideration was warranted and advantage has been taken of the provisions of Section 21 * to make a compassionate award. The following are particular instances:

1. A pensioner reported for re-examination and an 800B and an 865 was completed and forwarded to the Commission recommending an increase from 40% to 50%. He was killed in a motorcar accident when returning to his home.

The reports submitted were reviewed by the Commission and we agreed with the increased assessment. Pension, however, was not in payment in Classes 1 to 11 at the time of death, and the provisions of Section 32(2) ** could not be applied as of right. Advantage was taken of Section 21 to award pension to the widow from the date following that of death.

Section 21 is now Section 25.

Section 32 (2) is now Section 36(3).

General

- 2 There are other cases which follow the pattern I have indicated in (1), and awards have been made under Section 21.
3. A pensioner may have been discharged from the treatment strength to his home, where he has been continued on strength as an out-patient. The Commission does re-examine until completion of treatment and, unfortunately, death intervenes.

Where pension was not in payment in Classes 1 to 11 but the condition at the time of discharge from hospital treatment was such as to warrant an increase in assessment, the Commission again takes advantage of the provisions of Section 21 when a compassionate award is indicated and we are definitely satisfied as to the assessment.

4. In a very exceptional case, discharge of a pensioner has been effected from hospital and he has not been referred to the Commission for re-examination.

Again, where it may be clearly established an increase in assessment should have been made and the circumstances warrant compassionate consideration under Section 21, we take such action.

REPRESENTATIONS AND EVIDENCE

Royal Canadian Legion: The Legion based its representations on the assumption that the Commission was unable to approve an assessment or an increase therein, after death of the pensioner. The Legion suggested however, that the Commission was not consistent in the application of this policy and cited a case in which it claimed that the Commission had made an assessment after the death of the pensioner on the basis of the medical record relating to his condition prior to his death.

In a prepared brief, the Legion stated: 5

Occasionally the Legion comes across a case where it appears a pensioner was inadequately assessed prior to his death. Had pension been in payment in one of the Classes between 1 to 11, (48% or over) his widow would have received a pension.

In the case of Mr. G. (263/27) we were informed by the Chief Medical Adviser of the Commission that, "Medical Advisers are not empowered to make lifetime assessments after death.....". However, in the case of Mr. B. (104/29) we were advised that:

".....it has not been the policy of the Commission's Medical Advisers to make lifetime assessments after death except in those claims where fresh lifetime entitlements had been granted and the veteran died before he could be assessed and a very few claims coming under Section 36(3) of the Act."

Section 36, subsection 3 is the one that states on page 23 of the Act:

"Except as otherwise provided in this Act, the widow of a member of the Forces who was, at the time of his death, in receipt of a pension in any of the classes one to eleven, inclusive, mentioned in Schedule A, or who died while on the strength of the Department for treatment and, but for his death, would have been in receipt of pension at the rate so provided for any of those classes, is entitled to a pension as if the member had died on service whether his death was attributable to his service or not".

We fail to understand how the Commission is able in the one instance to make assessments and not in the other. Why is it not possible to use similar records for the pensioner who hold entitlement, as the Commission uses for the one who has been granted fresh entitlement?

Representations and Evidence

In certain instances when we have made representations on behalf of widows, the Commission - while not admitting an error - has granted awards under Section 25. (See cases of Captain M. (490/16) and Mr. M. (429/28)). In this latter case at Second Hearing decision on 25.7.65 it was stated:

"....The Table of Disabilities recommends 15% for nephrectomy without any symptoms. In this man's case we do definitely have symptoms in the other kidney and it is evident that this man's genito-urinary disability would have had an increased assessment which would have brought him into the group - Classes 1 to 11, and on this basis it is considered that the widow should be granted pension under the only available section, namely Section 25".

Mr. Donald M. Thompson, Dominion Secretary of the Legion, suggested that in some instances the Commission would have sufficient medical records on which to base a new assessment. The following discussion is recorded:⁶

Mr. Thompson: Yes. The point here, sir, is that when they make a lifetime ruling after death they then use medical records that are in existence.

Mr. Justice Woods: Yes.

Mr. Thompson: On which to base the assessment.

Mr. Justice Woods: But will they necessarily have them all?

Mr. Thompson: Well, they would have hospital records. They would have whatever type of records they would use in assessing the one instance, we believe, they would use the same type of record in assessing the other.

We do not understand how it is possible for them to do it when there has been a lifetime decision made after death. It may well have been, you see, in process and the man dies before the decision is rendered and they do not make the assessment until after they make the entitlement decision and now the man is dead. He died possibly last week and this week they are ruling on the lifetime claim and they rule the claim in, and they then have to use the records, their medical and hospital records and so on, to ascertain what the would have been assessed at if he had lived, because if he would be assessed at 50 percent or more the widow would be pensionable under that section of the Act.

Representations and Evidence

However, on the other hand, if the man has had a long-standing lifetime entitlement and he died the same kind of records are available, and it seems to us they could take those records and look at them and say, "Yes, in view of this he would have been getting 50 percent or more", and it seems they use them in one instance and won't use them in the other, and we can't understand that.

L'Association du 221ème Inc.: In a prepared brief, this Association made the following recommendation:?

Posthumous Assessments: The Pension Act Section 36(3) provides that pension shall be continued for a widow provided that the pensioner was in receipt of pension of 48% or greater or provided that the pensioner died of a cause directly related to his pensionable disability.

This Section of the Act is specific in stating that the pensioner must have been in receipt of such pension of 48% or more at the time of his death or if the pensioner died, while on the strength of the Department for treatment it must be shown that, except for his death, he would have been in receipt of a pension at the rate of 48% or greater. It is noteworthy that no provision is made in the Act for a case where a pensioner may have been assessed during his lifetime at less than 48%, but where it is possible to show, after his death, that if he had applied for an increase in assessment prior to his death, the pension could have been raised to an amount in excess of 48%.

It seems without question that there must be cases in which a pensioner in receipt of a pension of less than 48% would have been able to qualify for an increase in assessment but either neglected to, or was unable to do so in time to have that assessment increased prior to his death. In such instances provided that the pensioner dies from something other than his pensionable disability, the widow would be unable to qualify for pension.

This Association requests that consideration be given to an amendment of the Legislation to provide clearly that where unmistakable evidence is available to substantiate an increase in assessment above 48%, but where the Pension Commission had not taken action to increase this pension prior to death, consideration can be given to award a pension on behalf of the widow on the same basis as if the pensioner had been in receipt of a pension of 48% or greater.

Representations and Evidence

Major Paul Clavel, Secretary of the Association, suggested that the Act be amended to provide as follows: ⁸

Now we suggest that the Act be amended to read:.....
the widow of a member of the forces who was, at the
time of his death, in receipt of a pension of 48%
or greater, or who died while in receipt of a pension
of a lesser amount but, on whose behalf, evidence can
be adduced which is sufficient to indicate that, but
for his death, would have been in receipt of a pension
at the rate of 48% or greater is entitled to a pension,
etc.

Canadian Pension Commission: Mr. T.D. Anderson, Chairman of the Canadian Pension Commission, referred to the statement in the Legion brief to the effect that the Commission was able, in one instance, to make an assessment and not in another. In explanation, he stated: ⁹

The explanation is simple. If we have very recent and up-to-date medical information regarding the man's condition immediately prior to his death and the veteran died while on departmental strength, as required by the Act, we do consider the assessment. This is all the Act permits us to do. What we have been asked to do is to go back and assess the man's disability when he has been dead for years. Furthermore, we have been requested to do so on the strength of a medical report from the man's personal physician. This, for obvious reasons, we will not do. As the Legion points out, when there is definite evidence to indicate the possibility that the assessment might have been 50% or more, we grant entitlement at current rates under Section 25. This, of course, is just one of the many ways in which the Commission invokes Section 70. If the Commission finds the widow has been denied pension as the result of error, pension is granted under the procedural section. If, on the other hand, there is no error but justice can only be served by granting a pension, we do so under Section 25.

Mr. Anderson stated that the Commission could consider an assessment as described in his statement only if the medical records were up to date. The following discussion is recorded: ¹⁰

Representations and Evidence

Mr. Justice Woods: Now, you take the view there, if I remember correctly, that this can only be done reasonably soon after death, is that right?

Mr. Anderson: Yes, I think it has to be done during the period when at least we have some fairly up-to-date records on the man.

Mr. Justice Woods: But if there were good records and it is raised later on would he not still be eligible for it?

Mr. Anderson: Well, I think I would like to ask Dr. Brown to comment on that.

Dr. Brown: May I consult with Mr. Anderson?

Mr. Justice Woods: By all means consult all you wish.

Dr. Brown: * Originally they had to be in receipt of classes one to eleven in payment for the widow to get a pension when her husband died in a non-pensionable condition. Then the interpretation was broadened to include entitlements which were handed down by the Commission - favourable entitlement handed down by the Commission -- when the pensioner died before he could be called in for examination; and if there were adequate treatment reports available on which we could base an assessment we would base one, in fact, and in some of these -- or a few of these -- the initial assessment was 50% which put the widow into classes one to eleven automatically.

Mr. Justice Woods: And then she was pensionable then?

Dr. Brown: Yes. For instance, we had a claim not long ago where the man had entitlement for one gunshot wound in the shin and he got a tumour at the exact site of the wound for which he received a pension at the rate of 20%. The lesion was fibrosarcomic and the Commission, after getting reports on it, felt that this cancerous condition was connected with his gunshot wound; there was a question of misplaced tissue. The man died before we could get the ruling, and he died following a coronary, so that the death ruling was out. But when we accepted the relationship and the leg was to be amputated he would go on to a 70% pension from the date of the decision, to the date of his death; and then he went on pension in classes one to eleven.

This raised the question of going back further. Later the Commission again studied the matter and they did go back, and they are going back earlier when there are adequate reports on file.

* Chief Medical Adviser, Canadian Pension Commission.

Representations and Evidence

Mr. Justice Woods: But I see here your statement, and I appreciate that you are putting it somewhat into short compass, Mr. Anderson -- and I don't want to question one sentence; I want to give you a chance to elaborate on it -- you say; ".....Furthermore, we have been requested to do so on the strength of a medical report from the man's own personal physician....."

Now, is it the view of the Commission here that in the ordinary course of events you don't grant a pension unless your own medical people have had an opportunity to consider it and advise you on it?

Mr. Anderson: No. I wouldn't go so far as to say that; I think if we have a specialist who had looked at this man and there was a good specialist's report on him and so on within a reasonable time after the death we would consider that.

Mr. Justice Woods: Or even the report of a physician in whom you had reason to have confidence, apart from any other consideration?

Mr. Anderson: Yes.

Mr. Justice Woods: But what you mean here is that ordinarily, just on the bare statement of his own physician, you will not proceed; but you are not ruling this out?

Mr. Anderson: No, not entirely.

Mr. Justice Woods: I think you could infer from your statement that you do, you see.

HISTORY

As noted previously in this chapter, the policy of the Commission generally is to refuse to make an assessment posthumously unless, prior to his death, an applicant for pension had been examined for the purposes of such assessment and the medical records are sufficient to permit a proper assessment.

Your Committee was unable to locate a Commission instruction on the matter, other than the memoranda and minutes quoted on pages 2, 3 and 4 hereof. There is no reference to posthumous assessment in the Act.

It is clear, however, that the policy is a firm one within the Commission as indicated in the following excerpt from a memorandum issued by the Chief Medical Adviser under date of April 7, 1952:¹¹

Lifetime Assessments After Death

From time to time a number of files come to the attention of the Commission in which lifetime assessments have been made after death. In a number of these cases the man has made a lifetime claim for a condition and then dies. The Commission renders the favourable life and death decision simultaneously. The Commission, with respect to the lifetime claim, marks the effective date as twelve months prior to date of decision. The man has never been examined by our Pension Medical Examiner and, therefore, for official purposes, the exact rate of assessment has never been estimated.

The question arises as to whether or not an 865 should be placed on file assessing the disability from reports and making the award effective twelve months prior to date of lifetime decision (or whatever time the Commission designates in the decision).

For clarification of policy, this question was submitted to the Commission and the instruction to be followed in all cases is set forth, -

- (1) There must have been definite assessment prior to death of the disability for which entitlement has been posthumously granted.
- (2) There shall be no assessment made after death.

History

Your Committee noted two judgements of the Pension Appeal Court in 1931 1931 which have some bearing on this matter. These judgements involved an application before the Pension Appeal Court for rulings dealing with arthritis, rib fracture, a nervous condition and curvature of the vertebral column. The applicant had been refused pension by the Commission and had applied for re-consideration by the Pension Tribunal,* but had died before his case could be heard. The Pension Tribunal proceeded with the hearing, at which Pension Counsel representing the Pension Commission entered an objection in these words:¹²

I object. I would like my objection placed on the records. The applicant having died, the application dies with him, and a separate application has to be made on behalf of his widow. I submit that there is nothing before us.

The Pension Tribunal over-ruled the objection and decided that all conditions except the arthritis were attributable to or aggravated by service. Subsequently, the Commission appealed to the Pension Appeal Court on the grounds that the Tribunal erred in holding that it had jurisdiction to proceed with the application, in that the applicant was deceased.

The first judgement was filed by Colonel L.P. Sherwood and concurred in by Colonel L.R. Laflèche. The parts of this judgement which relate to the question of posthumous assessment follow:¹³

In accordance with the principle upon which such practice is founded, it would seem desirable that the attributability or otherwise of the injury, the subject of the late claim, should be ruled upon notwithstanding his unfortunate death.

Section 11 of the Act provides that pension shall be payable not only to but in respect of members of the Forces who have suffered disability in accordance with rates in Schedule "A". In what circumstances does the Act contemplate the award of pension not to, but in respect of a member of the Forces who has suffered disability?.....

* At that time the appellate structure included the Pension Tribunal and, as a final resort, the Pension Appeal Board.

History

It may appear at first glance from this section that if unpaid balance of a pension actually awarded is not to form part of the estate of the pensioner, a right to pension unasserted, or claimed but not officially recognized, would expire with the death of a member of the Forces. But consideration of the section will disclose that its underlying principle is beneficial to the pensioner as safeguarding, where necessary, his dependents against claims of creditors.

The spirit of the Act in general would therefore be consistent with the posthumous award of pension in proper cases if nothing in the Act expressly or impliedly prohibits.....

It is convenient that an application by a former member of the Forces pending at the time of his death should be ruled upon, having regard to the possible rights of such persons.

Accordingly, under the Act prior to 1910.30, in addition to there being a duty imposed upon the Commission to award pension, and no formal procedure required to claim pension, there is plain contemplation of application being made on behalf of a member of the Forces, and no suggestion of any restriction as to what agency may act. In practice, any relation, friend or soldiers' service organization may put forward and prosecute such a claim.

I am of the opinion that in accordance with the intent and spirit of the Act, the question of entitlement may be decided and in proper cases even a pension awarded posthumously in order that the authorities administering the Act should be placed in a position to consider the discretionary authority vested in them to make payments under the beneficial sections. I expressly refrain from embracing in this opinion cases in which a deceased member of the Forces has not evinced any desire to claim pension. Such a case does not arise for consideration, since the late Mr. _____ had actually claimed pension.

The President of the Pension Appeal Court, Mr. Justice J.D. Hyndman, filed a dissenting judgement, part of which read: ¹⁴

The particular point for decision herein is as to whether or not an application by a member of the Forces, which application was pending but not yet granted or awarded at the date of the death of said member of the Forces, may be further pursued at the instance of any other person after the death of such member.

History

I have examined the Pension Act very carefully to satisfy myself with regard to the question and have come to the conclusion that no authority exists for the prosecution of such a claim.

The Pension Act provides for two kinds of claims, namely -

1. Disability - which is personal to the member of the Forces, and
2. Death of a member of the Forces - in which case the claimant is the widow or children or other dependents referred to in the Statutes.

The only legislation which seems to give force to such a claim is that found in Section 20 of the Pension Act of 1930 Statutes, which reads -

20. Pensions shall be payable monthly at the end of each month: Provided that pensions for disabilities of less than twenty percent in extent shall be paid at the pensioner's option semi-annually at the end of the months of March and September in each year.
2. It shall be a matter within the discretion of the Commission whether a pensioner shall be paid any instalment of his pension which has remained unclaimed by or for him for more than two years from the date such instalment became due.
3. No pension shall be assigned, charged, attached, anticipated, commuted or given as security, and the Commission may, in its discretion, refuse to recognize any power of attorney granted by a pensioner with reference to the payment of his pension.
4. Any pension or balance of pension due to a deceased pensioner at the time of his death, whether unpaid or held in trust by the Department, shall not form part of the estate of such deceased pensioner.
5. The Commission may, in its discretion direct the payment of such pension or balance of pension either to the pensioner's widow and/or his child or children or to any person who has maintained him or been maintained by him or may direct that it be paid in whole or in part towards the expenses of the pensioner's last sickness and burial.
6. If no order for the payment of such pension or balance of pension is made by the Commission such pension or balance of pension shall be paid into the "Consolidated Revenue Fund of Canada".

History

It is important to note and remember the use of and definition of the word "pensioner", found in said section and in the interpretation section, 2(n). Section 2(n) reads:

n. "Pensioner" means any person who has been awarded a pension".

It might be convenient also to quote the interpretation of the word "applicant" as found in section 2(b) -

b. "Applicant" means any person who has made an application for a pension, or any person on whose behalf an application for a pension has been made, or any member of the Forces in whom a disability is shown to exist at the time of his retirement or discharge or at the time of the completion of treatment or training by the Department of Pensions and National Health".

It follows logically that a member of the Forces who dies without having been awarded a pension in his lifetime cannot, by any stretch of the imagination, be called a pensioner and, being dead, cannot ever become such. He was, at most, an applicant only.

There is no expresse statutory provision conferring on any third party the authority or power to apply for a pension for a disability in a member of the Forces since deceased, however deserving thereof the latter might have been had he lived, and I can discover nothing which would, by implication, confer such authority.

The right to pension is a purely statutory one; no common law liability as against the Crown exists, and no right arises except as is to be found in the Statutes of Parliament.

Therefore, in order to qualify or succeed in an application for pension, it follows that one must establish that his or her claim falls within one or some of the classes specified in the statutory enactment conferring the right to pension. In the absence of such enactment, clearly no legal grounds exist for entitlement in any way.

Even had he been granted or awarded pension prior to his death, but had not as yet been paid, a wide discretion remains to the Commission as to whom payment of such unpaid pension shall be made.

History

However, as pointed out above, that section applies only in the case of a "pensioner" which the deceased herein was not, and therefore can have no application.

There being no statutory provision authorizing the proceeding, I am firmly of the view that the Tribunal acted without jurisdiction in entertaining the claim, the applicant being in fact non-existent at the time of the hearing and there being no provision for devolution of his unascertained claims upon his legal representatives or otherwise, subsequent to his death. In effect, as the law at present stands, the claim is a purely personal one which must be established in the lifetime of the member of the Forces.

For these reasons, therefore, I would ALLOW the appeal and SET ASIDE the decision of the tribunal.

It would appear to your Committee that, in its policy on posthumous assessment, the Commission has accepted the dissenting judgement of Mr. Justice Hyndman rather than the majority decision of Colonel Sherwood, concurred in by Colonel Laflèche

Your Committee notes that there has been some misunderstanding regarding the meaning of the provision in Section 36(3) which reads:¹⁵

or who died while on the strength of the department for treatment and but for his death would have been in receipt of pension in one of the said classes.

Application has been made for pension on behalf of widows where pensioners in receipt of pension of less than 48³/₄ have died in a departmental hospital from other than the pensionable condition or who have been in the process of re-examination at a departmental hospital when death intervened. The application for pension is based on the assumption that the words "who died while on the strength of the department for treatment" were intended to provide pension in such cases.

Your Committee notes that this particular wording was clarified in an amendment to the Pension Act in 1948. The developments which led to the amendment are recorded herein, in order to provide an understanding of the intent of this provision in the Act.

History

Section 33(2) of the original Act read as follows: ¹⁶

Subject to paragraph one of this section, the widow of a pensioner who, previous to his death, was pensioned for disability in any of the Classes 1 to 5 mentioned in Schedule A shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not, provided that the death occurs within five years after the date of retirement or discharge or the date of commencement of pension.

1919

This subsection was amended in 1925, changing only the words "provided that the death occurs within ten years after the date of retirement or discharge or the date of commencement of pension."

1925

In 1928 Section 29 was amended to provide hospital allowance in lieu of pension during Departmental treatment, reading as follows: ¹⁷

1928

(1) During such time as, under the departmental regulations in that behalf, a pensioner is in receipt of pay and allowances from the Department while under treatment, payment of his pension shall be suspended and the pay and allowances shall stand in lieu thereof; pending a fresh award, payment of the pension shall recommence forthwith after the termination of such suspension.

(2) During such time as, under the departmental regulations in that behalf, a pensioner is an in-patient under treatment in respect of a disability other than his pensionable disability, his pension, if in excess of the amount he would have been entitled to receive by way of pay and allowances, if the disability for which he is under treatment had been pensionable, shall be reduced to such amount; pending a fresh award, the payment of pension in full shall recommence forthwith upon the pensioner's ceasing to be an in-patient as aforesaid.

This apparently led to technical difficulties in applying the provisions of Section 32(2) in cases where death took place from other than the pensionable condition during Departmental treatment, in that no pension was actually in payment at the time of death. As a consequence Section 32(2) was also amended in 1928 to read: ¹⁸

History

Subject to subsection one of this section, the widow of a pensioner who had died and who at the date of his death was in receipt of a pension in any of classes one to five mentioned in Schedule A of this Act, or who, except for the provisions of subsection one of section twenty-nine of this Act, would have been in receipt of a pension in one of the said classes, shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not, provided that the death occurs within ten years after the date of retirement or discharge or the date of commencement of pension.

In 1933 there was another change in the wording of the Section (the words underlined) as follows:¹⁹

Subject as in this Act otherwise provided, the widow of a member of the forces who had at the time of his death been, for not more than ten years, in receipt of a pension for a disability of or exceeding eighty percent or would have been in receipt of such pension if he had not been in receipt of pay and allowances from the Department while under treatment shall, irrespective of the cause of the death of her husband, be entitled to a pension as if his death had resulted from an injury or disease or aggravation thereof attributable to or incurred during military service.

1933

In 1946 Section 29 was amended to read as follows:²⁰

(1) During such time as, under departmental regulations in that behalf, a pensioner is entitled to hospital allowance while an in-patient under treatment from the Department and his pension including the pension if any, for his dependents, is greater than the hospital allowance payable by the department, pension shall be reduced by an amount which will make such pension equal to the hospital allowance.

1946

(2) During such time as, under the departmental regulations in that behalf, a pensioner is an in-patient under treatment in respect of a disability other than his pensionable disability, his pension, if in excess of the amount he would have been entitled to receive by way of hospital allowance, if the disability for which he is under treatment had been pensionable, shall be reduced to such amount; pending a fresh award, the payment of pension in full shall recommence forthwith upon the pensioner's ceasing to be an in-patient as aforesaid.

History

This resulted in a change in the wording of Section 32(2), deleting therefrom the words "or who, except for the provisions of subsection 1 of Section 29 of this Act, would have been in receipt of a pension in one of the said classes", leaving the subsection to read:²¹

(2) Subject as in this Act otherwise provided, the widow of a member of the forces who was at the time of his death in receipt of a pension in any of the classes one to eleven, inclusive, mentioned in Schedule A to this Act shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not.

While this substitution of "pension" for "hospital allowances" during treatment protected widows in cases where pension was actually in payment in Classes 1 to 11 when the pensioner entered hospital and death occurred from other than his pensionable condition during Departmental treatment, there still remained certain cases of long term treatment where the applicant, although holding pension entitlement, had never been assessed for pension purposes. Consequently Section 32(2) was again amended in 1948 as follows:²²

Subject as in this Act otherwise provided, the widow of a member of the forces who was at the time of his death in receipt of a pension in any of the classes one to eleven, inclusive, mentioned in Schedule A to this Act or who died while on the strength of the department for treatment and but for his death would have been in receipt of pension in one of the said classes, shall be entitled to a pension as if he had died on service whether his death was attributable to his service or not.

The explanatory note in the amending Bill 126 of May 12, 1948, read as follows:²³

New grants of pension entitlement are being continuously made by the Commission to former members of the forces who have been taken on the strength of the Department of Veterans Affairs for treatment. Many of these would be pensionable in classes one to eleven but assessment awaits completion of treatment and as administrative difficulties result from the delay in preparation and forwarding of documentation, the institution of pension

History

payments is unavoidably delayed. Should death occur in such cases from other than the pensionable condition or conditions, the surviving widow, if any, would not be eligible for pension and would thus be deprived of the protection this section is intended to provide.

It would appear from the foregoing that the basic provision or principle governing the application of this Section, namely that, provided the pensioner at the time of death was "in receipt of a pension in any of Classes 1 to 11 inclusive mentioned in Schedule A to this Act, the widow shall be entitled to a pension as if he had died on service, whether his death was attributable to his service or not", has at no time been disturbed.

The only apparent exception to the original provision is that laid down in the 1948 amendment, making provision for the widow in cases under long term Departmental treatment who, although holding pension entitlement died (from other than his pensionable condition) before actual assessment had been made for pension purposes.

The provision or principle was clarified at a general meeting of the Pension Commission on December 27th, 1950, at which time the following report was adopted:

1950

Arrangements have now been made and are presently operative to ensure early assessment and payment of pension in these long term treatment cases; the completion of this procedure should largely obviate the necessity for the 1948 proviso.

History

Confusion regarding the interpretation and application of the provisions of Section 32 (2) appears to have arisen largely since the 1948 Amendment.

Pursuant to the provisions of Section 5(3) of the Pension Act, your Committee finds that the words appearing in Section 32(2) reading: "Or who died while on the strength of the Department for treatment and but for his death would have been in receipt of pension in one of the said classes" should be interpreted as follows:

"In cases of persons while on the strength of the Department for treatment where pension entitlement has been granted but no assessment made prior to death during such treatment, and but for death of such persons would have been in receipt of pension in Classes 1 to 11, the widow shall be entitled to pension whether or not death was attributable to service."

There is no doubt whatsoever in the minds of the members of your Committee that the original intent of the provisions of Section 32(2) have at no time been departed from in the Statute. Nevertheless the Commission is from time to time asked to review and rule on various types of cases in which it is claimed on behalf of the applicant that "but for his death would have been in receipt of pension in one of the said classes, etc." Such submissions lack appreciation of the importance of the words, "or who died while on the strength of the Department for treatment"; and also that the 1948 proviso comprehended only long term treatment cases where no pension assessment had been made prior to death. In accordance with directions from the full Commission Meeting, your Committee will attempt to cite types of such cases:

(1) Cases holding pension entitlement, and/or where pension was in payment in one of the Classes 12 to 21 who enter Departmental hospital for treatment and death results from other than the pensionable condition before the procedure governing reassessment has been completed at Head Office.

(2) Cases holding pension entitlement, and/or where pension was in payment in one of the Classes 12 to 21 who have been examined for purposes of re-assessment which changed the classification, putting the pensioner in one of the Classes 1 to 11 but death intervenes before the procedure governing re-assessment has been completed at Head Office.

History

(3) Cases where lifetime pension claim was pending at time of death, and as a result of completion of this claim entitlement is granted with an award effective prior to date of death, the assessment of the pensionable disability being in Classes 1 to 11.

After a most careful study your Committee is unanimously of the opinion that the present Section 32 (2) cannot be interpreted to cover the above classes. In other words enabling amendments to Section 32(2) would be required before the Commission could confer similar benefits to those flowing from the present section on these cases.

COMMITTEE RECOMMENDATIONS

(138) That the Act be amended to make provision for posthumous assessment for the purpose of determining a widow's eligibility for pension under Section 36(3) of the Act, as follows:

Proposed
Amendments
For Posthumous
Assessment

(a) Where a person who has served in the Armed Forces dies and leaves a dependant, such dependant may, where sufficient grounds exist, submit an application to the Commission for an entitlement ruling and if entitlement is granted, but it is ruled that the death was not attributable to service, the Commission shall be empowered to approve assessment posthumously;

Ex-Member did
Not Apply
Before Death

(b) Where a person who has served in the Armed Forces has made application for pension and dies before entitlement is granted, or before an assessment is approved, the Commission shall give a ruling on entitlement, and shall be empowered to approve an assessment; and

Ex-Member
Applied
Before Death

(c) Where a pensioner dies and his assessment is less than 48%, the Commission may entertain an application after his death for an increase in assessment, and may be empowered to approve such increase.

Pensioner
Dies

COMMENT

The existing provisions under which a widow may make a claim for pension after death of her husband are explained hereunder:

(1) Where a former member of the Armed Forces who was not in receipt of pension dies, a widow may apply now under what is known as the "death claim" procedure, following which the Commission will rule as to whether such death was attributable to service. If the decision is in the affirmative, the widow will qualify for pension.

(2) Where a pensioner who is in receipt of pension of less than 48% dies, a widow may request a ruling from the Commission as to whether such death was connected with his pensionable disability, and thus was attributable to his service. If so, pension may be paid even though pension was in payment of less than 48%.

These provisions appear to be operating satisfactorily, but your Committee noted several problem areas where pension cannot be considered for a widow because of the prohibition against making posthumous assessments.

Your Committee's recommendations are designed to overcome these problems which are explained hereunder on the basis of three hypothetical cases:

(1) A former member of the Armed Forces who is not in receipt of pension dies. Under existing policy his widow makes application for a "death claim" but the Commission is limited to a ruling as to whether the death was attributable to service. If the Commission rules that the death was not attributable to service, the widow is barred from the provisions of Section 36(3) which provide that a pension may be paid to the widow of a pensioner who is in receipt of pension of 48% or more, regardless of whether the death was attributable to service. The problem arises from the possibility that, if the claim had been made during the ex-member's lifetime, the condition might have been assessed at more than 48% and the widow would have qualified for pension under Section 36(3).

Your Committee's recommendation is that, in these circumstances, a widow may make an application and the Commission may rule not only on the question of whether the death was attributable to service, but

Comment

if entitlement is granted, the Commission may also grant a posthumous assessment. Should this assessment be 48% or more, the widow would be entitled to pension.

(2) A former member of the Forces applies for pension but, before entitlement is granted, he dies. A similar but even more justifiable circumstance would be where the former member had applied and entitlement was granted, but under the existing Commission interpretation of the Act, the pension application halts because no assessment was made prior to the applicant's death.

Your Committee's recommendation envisages that the Commission may proceed to give an entitlement ruling and an assessment even though the applicant dies while the case is in process. Assuming that the Commission grants entitlement and the assessment is 48% or greater, the widow would qualify for pension under Section 36(3).

(3) The third case concerns the pensioner who is assessed at less than 48% and who dies from causes other than his pensionable disability. Under existing legislation the pension dies with him.

Your Committee's recommendation envisages that his widow could ask for a posthumous assessment, to determine whether, had he been re-assessed prior to his death, the assessment would have been 48% or more, thus making it possible for the widow to qualify for pension under Section 36(3).

The misunderstanding which has arisen in the past concerning the meaning of the words "or who died while on the strength of the department for treatment" would presumably be resolved if the Committee's recommendations concerning posthumous assessment are accepted. That is to say, where a former member of the Forces has died while under treatment, his widow would be able to ask for an entitlement ruling and, if such were granted, to request that a posthumous assessment be made to determine whether the condition would have been assessed at 48% or more. If so, pension could be awarded to her under Section 36(3).

Comment

Your Committee's recommendations concerning posthumous assessment should be considered as affecting procedures only. The adoption of these recommendations would not necessarily mean that a widow would be granted pension. These recommendations would merely make it possible for the Commission to consider a claim where there is sufficient evidence to indicate the possibility that, had an entitlement ruling and an assessment been processed during the pensioner's lifetime, his pension would have been assessed at 48% or more.

In justification of this, your Committee considers it is not equitable that the Commission should be barred from making a ruling on the grounds of procedure. If, after due consideration, there is insufficient evidence to indicate that an assessment of 48% or more could have been approved, it would be necessary that pension for the widow would have to be refused. Your Committee feels that, under the circumstances, the widow should be entitled at least to have her case considered.

It is the impression of your Committee that, under present circumstances, the Commission may have a somewhat restricted policy as to what medical evidence it will consider in regard to a posthumous assessment. In this regard, Mr. T.D. Anderson, the Commission Chairman, suggested that the Commission preferred evidence from the Commission's own staff and consultants.* Presumably, however, the Commission is always prepared to accept reasonable medical evidence concerning the extent of disability which existed in a member prior to his death.

* See page 1104 hereof.

Comment

In submitting its recommendations concerning posthumous assessment, your Committee desires to make it clear that there is no intention of suggesting that posthumous assessment should be made for the purpose of permitting a retroactive payment of pension which would accrue to the estate of a pensioner who has died. The purpose of these recommendations is solely to permit a widow to qualify under Section 36(3), if the assessment can be placed at 48% or more.

This chapter of the report should be read in conjunction with Chapter 25, Part IV of this Volume, which deals generally with widow's pension following the death of a pensioner. Your Committee has recommended, in that Chapter, that where a pensioner in receipt of pension of less than 48% dies, and his death is not attributable to service, a widow or child of the member of the Forces be awarded pension in proportion to the extent of the assessment in payment to the pensioner at the time of his death.

POSTHUMOUS ASSESSMENTREFERENCES

1. Canadian Pension Commission Subject File on Posthumous Assessment, Memorandum, dated October 22nd, 1953, from Brigadier J.S. Melville, Commission Chairman to Chief Medical Adviser of the Commission.
2. Minutes, General Meeting, Canadian Pension Commission, September 11th, 1952.
3. Ibid, September 4th, 1958.
4. Canadian Pension Commission Subject File on Posthumous Assessment.
5. Proceedings of Committee Sessions, Volume III, Page L-137.
6. Ibid, Volume III, Page L-138.
7. Ibid, Volume IV, Page Q-17.
8. Ibid, Volume IV, Page Q-18.
9. Ibid, Volume IV, Page R-48.
10. Ibid, Volume IV, Page R-49.
11. Canadian Pension Commission Subject File on Posthumous Assessment, Memorandum, dated April 7th, 1952, from Dr. W.F. Brown, Chief Medical Adviser of the Commission to Medical Advisers and Pension Medical Examiners.
12. Canadian Pension Commission Subject File on Posthumous Assessment.
13. Ibid
14. Ibid
15. Pension Act Section 36 (3).
16. SC. 1919, C.43, assented to July 7th, 1919.
17. SC. 1928, C.38, s.20, assented to June 11th, 1928.
18. SC. 1928, C.38, s.25, assented to June 11th, 1928.
19. SC. 1933, C.45, s.13, assented to May 23rd, 1933.
20. SC. 1946, C.62, s.19, assented to August 31st, 1946.
21. SC. 1946, C.62, s.20, assented to August 31st, 1946.
22. SC. 1948, C.23, s.10, assented to May 14th, 1948.
23. Bill 126, as passed by the House of Commons, May 12th, 1948, Page 4.
24. Minutes, General Meeting, Canadian Pension Commission, December 27th, 1950.

CHAPTER 37ADJUDICATION OF DISCRETIONARY AWARDSGENERALIntent of Discretionary Awards

There are a number of provisions in the Pension Act which permit an award of pension where the governing factor in adjudication is that of financial circumstances. This is in direct contrast to the basic principle which governs the "entitlement" provisions under which pension is awarded "as of right" to a member of the Forces who has been disabled, or to a dependant where a member has died.

The entitlement provisions are summarized as follows:

Section 13(1)(a) governs basic entitlement where an injury, disease or aggravation thereof has resulted in a disability which is attributable to or was incurred during military service during World War I or World War II.

Section 13(1)(b) provides pension where the member of the Forces has died when the injury, disease or aggravation thereof resulting in the death was attributable or was incurred during military service during World War I or World War II.

Section 13(2) provides pension when the disability or death arose out of or was directly connected with military service in peacetime.

An award of pension under the entitlement provisions described above bears no relationship to the financial circumstances of the member or his dependants. The pension for disability is paid in accordance with the extent of that disability as determined by the Pension Commission. The maximum rate for disability is fixed in Schedule A of the Pension Act and the pensioner may receive, under the Act at present, a pension of 100% or pension at the lesser rate depending on the medical assessment of the disability. The amount of pension for death is prescribed in Schedule B of the Pension Act and is approximately 75% of the maximum rate for disability as set out in Schedule A.

General

This chapter of the Report concerns the several discretionary provisions, the adjudication of which is in contrast to the entitlement provisions, in that the main requirement is the application of a "means test" in regard to the financial circumstances of the case.

These discretionary cases are of two types. In one the general principle appears to be that of providing additional pension where a pensioner is responsible for the support of dependants who are not the immediate members of his family, but for whom he may have some responsibility of maintenance. Those covered in these provisions are parents, brothers and sisters. Wives who have been divorced or separated from the pensioner are also included in this group.

Presumably, the intent of the legislation as it applies to this group is to ensure that the disabled ex-serviceman is provided with additional pension where he might otherwise have to use part of his personal pension for the support of these dependants. It is of interest that, in applying this "means test", the Commission is not required to investigate into the financial circumstances of the pensioner. The amount of his assets, or of his income from employment or other sources, is not taken into account. The only requirement is for the Commission to determine that the financial circumstances of the dependant are such that he or she is without earnings or income sufficient to provide maintenance and, consequently, must look to the pensioner for assistance. If the member of the Forces is dead, the Commission must determine also whether the member contributed to the support of the dependant prior to his death, or if not, whether he would have contributed to such support if he were alive.

General

The other type of applicant for whom provision is made in the Act for an award of pension at the discretion of the Commission is where entitlement cannot be awarded, or alternatively where the recipient has become dis-entitled, but where there appears to be grounds for an award of pension. The first of these provisions is that of Section 25 of the Act, which provides for a compassionate pension where the circumstances will not permit an award under the regular sections of the Act. Another provision is under Section 14(2). Here the Commission may make an award, even though a death or disability has arisen due to improper conduct and is thus barred under Section 14(1). The third such provision is where a widow has relinquished her pension on re-marriage, but later falls into a financially-dependent condition following the death of her second husband.

This second group differs from the first, in that it is the financial circumstances of the primary recipient which must be taken into consideration. That is, where consideration is being given to an award of pension to an ex-member of the forces under Sections 25 or 14(2) the member must be in a financially-dependent condition before he can qualify. Where consideration is being given to an award of pension to a widow under Section 25 or Section 45(2) her financial circumstances must be such that she requires assistance. The remainder of this Chapter of the Report is presented in two sections: Discretionary applications and Definition of "dependent condition".

SECTION ADISCRETIONARY APPLICATIONS

General: The Commission has discretion to award pension on a discretionary basis in a number of special circumstances involving ex-members of the Forces or their wives, widows, dependent parents and dependent brothers and sisters. The maximum amounts which may be awarded in these circumstances vary widely under the Act, and the Commission has discretion as to whether the payment shall be made in the maximum amount or in a lesser amount, depending on the financial circumstances of the case. These maximums are revised by Parliament from time to time, following which the Commission reviews each case to determine whether a change in the amount of pension is indicated.

The main provisions of the Act in respect to these discretionary areas are set out hereunder:

14(2): The Commission may award pension notwithstanding the provisions of Section 14(1) to the effect that pension shall not be awarded when the death or disability was due to improper conduct.

25: The Commission may grant a compassionate pension in any case it considers to be specially meritorious.

26(1)(a): Dependent child who suffers from physical or mental infirmity.

34(3): Additional pension for dependent parent at rate of additional pension for one child under Schedule A provided that the parent was in a dependent condition previous to the pensioner's enlistment or his service.

34(4): Makes a similar provision where the parent was not in a dependent condition prior to or during service but subsequently falls into a dependent condition.

35: The Commission may pay last illness and burial expense of pensioner if estate insufficient.

36(5): The Commission may award a pension to a widow who had been divorced, judicially separated or separated pursuant to a written or other agreement from a pensioner who is dead even though she had not been awarded alimony or was entitled to an allowance under the terms of the separation agreement, provided she is in a dependent condition.

General

36(6): The Commission has discretion to award a pension to a widow, even though there was no award of alimony or separation agreement, provided the Commission is of the opinion that she would have been entitled to an award or other allowance had she made application therefor under due process of law.

38(1)(b): This permits the Commission to award pension to a dependent parent where such may be awarded under Section 13 in respect of the death of the member of the forces, provided the member died without leaving any widow or divorced wife who is entitled to the pension, or a woman awarded a pension under subsection 4 of Section 36 provided the parent is in a dependent condition and was at the time of the death of the member being maintained by him. The maximum rate as set out in Schedule B of the Pension Act for Lt/Col. (Army) and equivalent ranks or below is \$1,428 per annum.

38(2): Where a member of the forces had died leaving a widow or other person entitled to widows pension and in addition is survived by a dependent parent, the Commission may award pension to such dependent parent. The amount may not exceed \$636 per annum. If the amount of pension to a woman awarded a widows pension is discontinued the amount awarded to a dependent parent may be increased to the maximum permissible under Section 38(1)(b).

38(3): The Commission may award pension to a dependent parent who was not wholly or to a substantial extent being maintained by the pensioner if such parent is incapacitated by mental or physical infirmity provided the member would have maintained such parent if he had not died. The maximum award in this instance is \$1,428 as above.*

39(1): Makes provision for pension for a brother or sister in respect of the death of a member of the forces if the member died without leaving any child or person entitled to widows pension if the brother or sister is in a dependent condition. The maximum amount that may be provided under ordinary circumstances is \$360.00 a year.

39(2): Permits the Commission to pay a pension in the same circumstances as 39(1), but if such brother or sister is an orphan or subsequently becomes an orphan he or she is entitled to pension at orphan rates under Schedule "B", i.e., \$720.00 per annum.

* Under Section 38 (4) where the member had died leaving more than one parent the pension for one parent may be increased by an additional \$300 per annum and the total apportioned between such parents.

General

39(5): Provides pension for a brother over the age of 16 or a sister over the age of 17 in a dependent condition who was maintained by a member at the time of his death, if such brother or sister is incapacitated by mental or physical infirmity at an amount of \$720.00 per annum.

45(2): Where a woman in receipt of pension as a mother, widow or divorced wife remarries and, through the death of her husband within a period of five years after marriage the woman is left in a dependent condition, the Commission may pay pension at the rate provided in Schedule "B" for a widow or at such a lesser rate as the Commission may, in its discretion decide.

COMMITTEE RECOMMENDATIONS .

(139) That the Canadian Pension Commission publish an "Assets and Income" guide, setting out permissible assets, maximum income ceilings and other factors which govern decisions of the Commission in regard to applications under those sections of the Act where an award may be made in the discretion of the Commission and where the decision depends upon the financial circumstances of the dependant or the pensioner.

Assets
and
Income
Guide

(140) That the Canadian Pension Commission publish a "Suggested Expenditure" guide, setting out the permissible allowances for food, shelter, clothing and other necessities on an adjustable basis for each geographical area, to be used in determining eligibility for an allowance at the maximum rate provided under the Act, or at a lesser rate if appropriate.

Suggested
Expenditure
Guide

COMMENT

The amounts provided in the Act for discretionary awards have been arrived at after deliberation over the years, and appear to be in equitable relationship with the basic rate of pension for 100% disability or death. It may appear, at first glance, that a more orderly classification for the various types of dependant could be determined. In fact, your Committee did give consideration to a number of alternative proposals but concluded that the relationship which these various classes bears to the basic rate of pension should not be disturbed.

As has been noted above, the Commission is given authority to pay pensions in these discretionary areas at less than the maximum, where such is deemed appropriate on the basis of financial investigation of the circumstances of the applicant. The decision of the Commission as to whether a maximum award is warranted is based on financial investigation of the circumstances. The definition of "dependent condition" as discussed later in this Chapter applies in this respect. The Commission has not laid down specific guidelines and apparently it evaluates each case on its individual merit.

"Assets and Income" guide: Your Committee's recommendation is that the Commission should develop a guide setting out assets, income ceilings and other factors which would be taken into consideration in making its decisions in these discretionary areas. A basic guide of this nature would be useful for district offices of the Commission, and for the Commission's investigators and the welfare officers of the Department of Veterans Affairs who are responsible for investigation of financial circumstances in individual cases. The guide would be useful also for officials of veterans organizations and others who must, from time to time, advise the applicant concerning pension legislation.

Comment

"Suggested Expenditure" guide: Your Committee has recommended the adoption of a "Suggested Expenditure" guide which would be complimentary to the "Assets and Income" guide, and which would indicate permissible allowances for food, shelter, clothing and other necessities, depending upon the geographical location of the applicant. A formula of this nature has been found useful in the administration of the Assistance Fund which provides supplemental financial aid from the Department of Veterans Affairs for recipients of War Veterans Allowance.

For the purpose of administering the Assistance Fund, living costs across Canada were studied and seven different food rates were established. Other costs, such as clothing, personal care and household operation are accepted as standard for all areas. In calculating the household expenses of a W.V.A. recipient, the actual cost of items such as rent, heating, public utilities, real estate taxes and property fire insurance, where applicable, are accepted subject to verification. The Assistance Fund formula now in use by the Welfare Services of the Department of Veterans Affairs follows:

Formula costs for food, clothing, personal care and household operation according to family composition.

It will be necessary to calculate these costs for families of six or more children or where special diets are prescribed. When this is necessary the following should be used as the basis of calculation.

Food Allowance *

1 adult without dependent children	\$39.50 to \$48.50
2 adults without dependent children	\$68.50 to \$84.50
1 adult with dependent children	\$32.50 to \$39.00
2 adults with dependent children	\$58.00 to \$71.50

additional amount for children

0 - 4 years	\$15.00 to \$18.00
5 - 9 years	\$20.00 to \$24.50
10 - 14 years	\$22.00 to \$28.00
15 years and over	\$32.50 to \$41.50

* There are seven different food allowances under the formula and amounts shown are the minimum and maximum rates. Each district is allocated one rate only and this is based on local food costs.

CommentModification Guide

No. of children	1	2	3	4	5	6	7+
1 adult add %	20	10	7	4	1	-	-
deduct %	-	-	-	-	-	2	5
2 adults add %	10	7	4	1	-	-	-
deduct %	-	-	-	-	2	5	5

Other Allowances

1 adult without dependent children
 clothing \$10.00, personal care \$18.00, household
 operation \$5.00

1 adult with dependent children or 2 adults
 clothing \$20.00, personal care \$30.00, household
 operation \$8.00

Other AdjustmentsRestaurants

All meals eaten in restaurants - add 33 1/3%

Special Diets

When VADA * accepts that a special diet is necessary for
 an applicant or dependant, the indicated food allowance
 for such person may be increased in accordance with the
 following scale.

<u>Type of Diet</u>	<u>Percentage Increase</u>
Low residue.....	33 1/3 %
Gastric.....	33 1/3 %
High Protein.....	33 1/3 %
Restricted Sodium No. 1.....	15 %
Restricted Sodium No. 2.....	25 %
Low Fat-Diabetic.....	33 1/3 %
High Fat-Diabetic.....	33 1/3 %
Low Calorie.....	33 1/3 %

* Veterans Allowance District Authority.

Comment

A similar formula or guide for applicants under the discretionary areas of the Pension Act would provide a means of ensuring standard adjudication from place-to-place. Also, it would provide a useful tool for the guidance of district office staff and investigators, and for veterans organizations and others who have the responsibility to advise pension applicants.

Uniform decisions: It would appear to your Committee that, in the absence of any published directives, the Commissioners must encounter difficulty in maintaining uniformity in their decisions, having regard for the variety of circumstances which apply in the individual cases coming before them. The Commission undoubtedly strives for consistency in its adjudication but your Committee considers that the standard of living which should be acceptable to the Commission for persons coming under these discretionary provisions of the Act would be more accurately arrived at on the basis of the suggested guides.

These guides would work both ways. Should a dependant insist on a higher scale of living than might be considered reasonable for his circumstances and geographical location, the Commission would be on just grounds to pay pension at less than the maximum, or even to refuse an award of pension. On the other hand, the use of standard guides would have the effect of ensuring the maximum award possible where the circumstances of a dependant, as determined in an investigation, indicated a standard of living far below that which might be reasonable. In the latter type of case there is an inherent danger, if no policy regarding permissible expenses is set out, of the applicant receiving less than that to which he is entitled, where the Commission's adjudication is based on the applicant's own estimate of his needs. Where this estimate

Comment

is less than the Commission would ordinarily be prepared to accept as reasonable, the applicant could be placed at a disadvantage compared with the applicant whose estimate of his needs indicated an unreasonably high standard of living.

Your Committee is of the opinion that the Commission has attempted, over the years, to treat dependants coming within the discretionary provisions of the Act as fairly as possible. It does appear, however, that the adoption of some recognizable standards to be used in adjudication would be preferable to the present system under which decisions in these cases are presumably made without the benefit of any realistic yardstick.

SECTION BDEFINITION OF DEPENDENT CONDITIONGENERAL

Section 2 (h) reads as follows:¹

"dependent condition" means the condition of being without earnings or income sufficient to provide maintenance.

This definition is interpreted to mean that, to be in a dependent condition, a person must be without earnings or income sufficient to provide for maintenance. The Act makes no specific mention of assets.

Your Committee noted cases in which it appeared that the Pension Commission had been required to award pension, even though the recipients owned property which was capable of producing income in an extent which, if taken into account, would have meant that the recipient was not in a financially-dependent condition.

In one such case ² dependent parents' pension had been paid from 24th of October, 1956 to the 31st of October, 1963, during which period the mother had assets which were valued for estate purposes on her death at \$26,382. The overpayment created by the payment of pension during this period was \$7,412.65. The Pension Commission file indicates that legal action for the recovery from the estate might not be successful in view of the existing definition in the Pension Act of "dependent condition".

COMMITTEE RECOMMENDATION

(141) That the Pension Act be amended to provide a definition of "dependent condition" to mean the condition of being without earnings or income or without assets capable of producing income, the total of such assets being sufficient to provide maintenance.

Dependent
Condition
To Mean;
Without
Earnings or
Income or
Without Assets
Capable of
Producing
Income.

Comment

It seems unrealistic that, in deciding whether an applicant is in a financially-dependent condition, the Commission should be prohibited from taking into account the value of assets which could be considered as capable of producing income.

The value of a home which is required to house an applicant should not be taken into consideration, unless that house is more adequate than the requirements would indicate, having regard for the principle that pension can be paid, under discretionary basis, only where the Commission considers financially dependent circumstances apply. On the other hand, where an applicant owns property other than that in which he resides, it seems reasonable that under normal circumstances he should be expected to dispose of this property or, alternatively, that the Commission should be allowed to make an assessment of the amount of income which the property may reasonably be expected to produce, and take this into account in assessing the requirement for assistance under the Pension Act.

REFERENCES

1. Pension Act, Section 2 (h).
2. Committee Case File No. 11.

CHAPTER 38DISCLOSURE OF INFORMATION FROM PENSIONER'S FILEGENERAL

All official documentation relative to a pensioner or pension applicant is retained on a Department of Veterans Affairs file of the individual ex-member of the Forces. Pension matters are combined with other departmental papers in one single departmental file for each ex-member.

The Pension Act provides in Section 69(c) that public servants may have access to these Departmental files "in order that they may discharge their duties".

Departmental Instructions of the Department of Veterans Affairs provide that, under certain circumstances, the information on an ex-member's departmental file is available to persons and agencies outside of the Canadian Pension Commission and the Department of Veterans Affairs, and for the purposes other than those which are departmental or which are directly concerned with pension, or an application therefor.

Department of Veterans Affairs Departmental Instructions govern the use of departmental files. The particular references in these Instructions to which your Committee has given concern are as follows:

Departmental Instructions, Chapter 13

8. The following persons may have access to, or receive information from the file without the consent of the veteran:

- (a) officers of the Department, Canadian Pension Commission, War Veterans Allowance Board, the Auditor General, RCMP, any Federal government department or agency or British Ministry of Pensions and National Insurance who need to examine the files in connection with the discharge of their official duties.

General

9. The following persons may, in the exercise of their official duties, either with the written consent of the veteran OR in the public interest, receive information from a file:
 - (g) accredited medical advisers of firms or of another government, with the approval of DGTS or STMO or a medical officer designated by either of them, provided the veteran's written consent has been received;
12. (1) DGTS * may, in his discretion, furnish the Medical Director of an Insurance Company with such medical information as he may deem necessary from the file or otherwise in possession of the Department relating to a person who has made application for life insurance, provided that the Insurance Company has filed with the Department an undertaking to treat such information as confidential, and the person has submitted his written authority to have such information furnished to that Insurance Company; and all applications for such information received by DCs shall be referred by DOs to HO.
 - (2) STMO ** may, in his discretion, furnish the Medical Director of an Insurance Company with such medical information as he may deem necessary from the file or otherwise in the possession of the Department relating to a person who has made application for casualty or sickness insurance, provided that the Insurance Company has filed with the Department an undertaking to treat such information as confidential and the person has submitted his written authority to have such information furnished to that Insurance Company.

It should be noted that information may be obtained under DVA Departmental Instructions, Chapter 13, paragraph 8 by another Federal Government Department for the purpose of considering an application for employment, without the veteran's written consent. Medical directors of Insurance Companies may receive information from a DVA file only with the veteran's written consent.

* Director General Treatment Services, Department of Veterans Affairs.

** Senior Treatment Medical Officer, District Office, Department of Veterans Affairs.

REPRESENTATIONS AND EVIDENCE

Employment: Your Committee received a letter of complaint from a pensioner² whose promotion in the Federal Civil Service had been refused on medical grounds, based on a report to the Civil Service Commission from the Department of National Health and Welfare, obtained through review of Pension Commission records on the Department of Veterans Affairs file of the pensioner. This appeared typical of many cases, and your Committee was informed, in a letter from T.A. Murray, Assistant Secretary of the Department of Veterans Affairs, under date of December 17, 1965, as follows:³

It has been the practice for many years in this Department to co-operate with officers of the Civil Service Health Division and the Civil Service Commission, in connection with the placement of veterans in positions in the Public Service.

It can be stated, therefore, that quite frequently the Civil Service Health Division draws veteran's files for perusal. The authority in this regard is contained in Volume I, Book 4, Chapter 13 of the Departmental Instructions.

Insurance Companies: In one case, which your Committee considers typical, a 75% pensioner for gunshot wounds incurred during World War II had made application to a life insurance company for a life insurance policy. His departmental file included, in addition to reports on his pensionable condition, a report on an examination for heart disease. The report, forwarded to the insurance company from the Director General of Treatment Service, Department of Veterans Affairs, under date of May 13th, 1965 included this reference:⁴

Representations and Evidence

He was examined in the heart clinic in July, 1959. The following is quoted from the Cardiologists's report, "Electrocardiogram shows sinus rhythm at 70 PR intervals .16, T waves are flat in 2 and negative 3 and AFV flat in V5 and V6. This is an abnormal record indicative of myocardial damage especially in the posterior myocardium.

On fluoroscopy the heart is not grossly enlarged. The lung fields are clear. With barium in the oesophagus no left atrial enlargement and no valve calcification is present.

Opinion: This man has objective evidence of heart disease based on a faint murmur and an abnormal E.C.G. I think it is doubtful that he is having any symptoms from this condition at the present time. I would think his heart disease is on a myocardial-basis, rather than valvular disease and would suggest that he be re-examined in 6 months.

Diagnosis: Suspect Arteriosclerotic Heart Disease.

The pensioner's application for life insurance was refused by the company.

COMMITTEE RECOMMENDATION

Confidential
Information
Not to be
Released to
Employers
and Insurers

(142) That the provisions of the Pension Act and the Department of Veterans Affairs Instructions which permit access to files and disclosure of information to medical advisers of firms or of other governments, and to the medical directors of insurance companies, be cancelled; or, should the Department of Veterans Affairs consider that prospective employers or insurance companies should have access to information on a departmental file, other than that which relates to pension, separate files be established for pension matters, and that there be no disclosure from these files to prospective employers or insurance companies.

COMMENT

On initial examination, your Committee considered there was no valid objection to the disclosure of information from pension records to prospective employers or insurers, so long as prior consent had been obtained from the pensioner. It was only on closer study that it became apparent that there are certain inherent dangers in this procedure. These are examined below.

Pensioner's Consent: So long as authority exists under which a prospective employer or insurer may have access to this information, there is an element of compulsion involved. An applicant for employment or insurance, who is a pensioner, can always refuse to give consent. However, in doing so, he is running the risk of leaving the impression that he has something to hide, when in fact he does not have complete knowledge of the contents of his file. An employer or insurer, faced with such refusal on the part of an applicant, might develop some curiosity as to whether the pension records contained information which, if available, would affect the decision under consideration.

There can be a great deal more to this factor of the pensioner giving his consent that might appear on the surface. In practical application this procedure amounts to a "gun at the head" of the pensioner. He is placing himself in an invidious position if he withholds the consent. If he grants it he is acting in the dark as he does not know the contents of his file. Also he would have no opportunity for explanation regarding possibly harmful information which an employer or insurer may obtain through the file.

Medical Diagnosis: It seems possible that many pensioners could be unaware of the meaning, and perhaps the portent, of the diagnosis used to describe medical conditions. For example, a pensioner may have been told that he has arthritis. There are many different forms of this

Comment .

disease, and the American Illustrated Medical Dictionary ⁵ defines it as being due to "gout , rheumatism, gonorrhoea, traumatism". The point here is that a pensioner may be of the opinion that the disclosure of information to a prospective employer or insurer to the effect that he suffers from "arthritis" could not be harmful. It is possible, however, that the description of the disability in medical terms might tell a prospective employer or insurer a much different story than that which the pensioner envisaged. Your Committee feels that, because many pensioners do not have a complete understanding of the medical diagnosis of their condition, it is not equitable to retain a procedure under which such information can be revealed in regard to applications for employment or insurance.

Another aspect concerning medical diagnosis is the use of specific terms. For example, a pensioner may have been given a medical diagnosis and assessment by the Pension Commission for psychoneurosis. It is believed that this term has a very broad application in pension administration. There is also the possibility that a medical officer of the Commission, in an attempt to be helpful to an applicant, may have used the term in a very special sense. This is particularly pertinent in those pension cases where the applicant had long combat service. The Commission doctor may have considered that the use of the term within the confines of pension administration was justifiable. Had he considered that this diagnosis would be revealed outside of the Department, particularly in regard to an application for employment or insurance, he may have preferred to state the diagnosis in different terms.

At the same time, your Committee sympathizes with the medical

Comment

officer of the Department of Veterans Affairs who is given the responsibility to prepare a report to an employer or insurer on the pensioner's condition. If the file states "psychoneurosis" this diagnosis would presumably have to go into the report, and although your Committee firmly believes that the departmental staff would do its best to give an explanation in sufficient length to ensure accuracy, there is always the possibility of misunderstanding.

Non-pensionable Disabilities: The files of many pensioners contain information relative to medical conditions other than those for which pension is in payment. This comes about partly because an applicant may have made application for a number of conditions for which entitlement has not been granted. Also, your Committee is mindful of the fact that, in making application for pension, it is possible that the applicant will describe a condition in the gravest terms at his command. This is understandable as he is attempting to establish a pension claim. These statements become part of his record, although they may have nothing to do with his pensionable condition.

In addition, many pensioners have taken advantage of the provisions of the Treatment Regulations of the Department under which they can be hospitalized for non-pensionable conditions, on a repayment basis. This has had the result of building up, on the pensioner's file, a considerable medical history which has no direct relationship to his pensionable condition. However, if the time comes for a

Comment

pensioner to consent that information be revealed to a prospective employer or insurer, he may very well be thinking in terms only of his pensionable condition and may not be aware of the complex medical report which might possibly be furnished on him.

General: Your Committee is aware that, in this procedure under which information may be disclosed to employers and insurers, there may be some potential benefit to be weighed against the dangers, and even impropriety, of a procedure which permits the disclosure of this information. On the balance, any benefits seem to be far outweighed, and the effect of this procedure, in so far as your Committee is concerned, is to place the pensioner at a disadvantage compared with non-pensioners.

Should an employer or insurer require factual information relative to a pensioner's medical condition, he should obtain this through the same methods as he must necessarily use for the population at large. This would not give the pensioner any additional benefit which may accrue from the existing procedure. At the same time, it would not have the result of inadvertantly providing information to an employer or insurer which may prove harmful to him. As well, it would not place him in the untenable position of having to withhold consent for an employer or an insurer to have this information from his confidential pension records. In short, your Committee believes the procedure is not consistent with good pension administration, and should be removed.

DISCLOSURE OF INFORMATION FROM PENSIONER'S FILEREFERENCES

1. Department of Veterans Affairs, Departmental Instructions, Volume I, Book 4, Chapter 13.
2. Committee Case file No. 12
3. Committee Case file No. 12
4. Committee Case file No. 2
5. American Illustrated Medical Dictionary, by Dr. W.A.N. Dorland, W.B. Saunders Co., 1944.

CHAPTER 39EXEMPTION OF PENSION FROM INCOME TAXGENERAL

The Income Tax Act, Section 10(1)(d), provides that payments made under the Pension Act shall not be included in computing the income tax payable to the Department of National Revenue. This provision reads:¹

a pension payment or allowance that is received under or is subject to the Pension Act, the Civilian War Pensions and Allowances Act or the War Veterans' Allowance Act, or compensation received under regulations made under section 5 of the Aeronautics Act.

The Report of the Royal Commission on Taxation² recommended that the statutory exemption for pensions under the Income Tax Act be eliminated. This report stated:³

The comprehensive tax base we recommend should encompass all forms of income, and therefore in principle all exclusions and exemptions should be terminated. We recommend that all income should be taxed in full and, if specific relief were required in respect of payments by the government, the need should be met through higher payments.

Certain items referred to in section 10 such as workmen's compensation and unemployment insurance have already been discussed. The balance of the items are briefly discussed below, along with our specific recommendations for changes.

Service Pension or Allowances Section 10(1)(d)

Exemption should be eliminated after consideration has been given to a revision of the amounts payable.

Your Committee studied the recommendation of the Royal Commission on Taxation concerning elimination of the statutory exemption of pension for income tax, in order to determine its effect, if implemented, on payment of pensions for disability or death arising from military service.

REPRESENTATIONS AND EVIDENCE

The sittings of your Committee, during which representations and evidence were heard from veterans organizations and others, were concluded prior to the publication of the Report of the Royal Commission on Taxation. Accordingly, the submissions to your Committee did not include reference to the income tax exemption on pension. Veterans organizations did, however, refer the matter to your Committee in correspondence as set out below:

Royal Canadian Legion: In a letter dated April 26th, 1967, this association set out its views on abolishing the exemption as follows: ⁴

We understand that your Committee has not as yet completed its final report so we are taking this opportunity of bringing to your attention an item contained in the report of the Royal Commission on Taxation, which was tabled in the House of Commons on 24 February, 1967. This report contains a recommendation which, if accepted by the Government, will have the effect of eliminating the exemption of disability pensions under the Income Tax Act. Other benefits paid veterans and dependents under the W.V.A. Act and the Civilian War Pensions and Allowances Act would also be affected by the recommendation, which is to the effect that all exclusions and exemptions should be terminated, and on page 532 you will find the following:

"Service Pension or Allowances:
Section 10(1)(d)

Exemption should be eliminated after consideration has been given to a revision of the amounts payable."

It is our understanding that exemption for disability pensions has been contained in the legislation since 1920. You may be interested in the following excerpt from the House of Commons report of June 8 of that year (Hansard, Volume IV, page 3253). Sir Henry Drayton said,

"As it reads now, it says that the 'income from pensions' shall not be taxable, but it is the pension itself that should not be taxable, and so we say that no pension so earned shall be taxable. Instead of reading 'income derived from any pension,' it will now read: 'any pension' granted to any member of His Majesty's military, naval or air forces or to any relative, and so forth. It would be manifestly unjust to tax those pensions. They are used annually; they are not invested. The idea is to make it clear that the soldiers' pensions are not taxable."

Representations and Evidence

While there has been no indication that the Government is giving consideration to accepting the recommendation, we do believe it would be most unfair to consider at this late date the taxing of pensions which are paid for deaths and disabilities resulting from service in Canada's Armed Forces. We feel the members of your Committee may wish to give consideration to the recommendation and we hope, go on record as opposing acceptance of it by the Government.

Army, Navy and Air Force Veterans in Canada: This association, in a letter to your Committee under date of April 28th, 1967, made the following comment on the recommendation to remove the income tax exemption for pensions:⁵

When the Army, Navy and Air Force Veterans in Canada had the privilege to present its Brief to your committee on December 6, 1966, the "1966 Carter Report of the Royal Commission on Taxation" was not available for study of any implications the recommendations of the report would have on Canada's War Disability Compensation recipients.

We, therefore, request the following comment be appended to the Army, Navy and Air Force Veterans in Canada Brief:

Page 531 of Volume 3 of the "Carter" report, under the heading "Sundry Other Items of Income", reads:

"There are several kinds of receipts that are excluded from income under section 10 or exempt from tax under section 62(1) (a) of the Income Tax Act or under other legislation."

"The comprehensive tax base we recommend should encompass all forms of income, and therefore in principle all exclusions and exemptions should be terminated. We recommend that all income should be taxed in full and, if specific relief were required in respect of payments by the Government, the need should be met through higher payments."

To clarify its recommendations, the "Carter" Committee report mentioned definite benefits which should be included; such as Workmen's Compensation, Unemployment Insurance, Service Pensions or Allowances, and Royal Canadian Mounted Police Pensions.

Also specific exemptions were recommended: the Governor-General should be maintained, and extended to Lieutenant-Governors; Expense Allowance for Members of a Legislative Assembly; Municipal Officers' Expense Allowance; and employees of another Country.

Representations and Evidence

What is of great concern to the members of the Army, Navy and Air Force Veterans in Canada is that the present exemptions, which are now in effect for War Disability Compensation, are not mentioned in the exemptions. Our only conclusion must be that compensation paid to Canada's war disabled and dependants is to be included in the "Sundry Other Items of Income" quoted and recommended the exemptions should be terminated.

The basis for awarding war disability compensation is for loss of earning power and suffering incurred on Active Service, or the result of such service. It is by no means of the imagination to be compared with general earnings or other means of income. One in receipt of War Disability Compensation does not turn on the condition for which he is compensated -- at say nine in the morning and by the same token turn it off at five o'clock in the afternoon. He has the loss he has sustained by War Service and is suffering twenty-four hours in the day.

Under the "Carter" recommendation, the seriously disabled and those in receipt of Attendance Allowance would be more affected than those with lesser disabling conditions. The loss of expectancy of life is also a factor to be considered for the seriously disabled.

Widows, dependants and those depending on their small pensions would become taxable or placed in a higher taxation bracket.

For years, when adequate War Disability Compensation was requested, the Government of Canada has used as a factor in determining the Rate of War Disability Pensions exemption for Income Tax purposes.

In considering the recommendation of the "Carter" committee "that where specific relief were required in respect of payments by the Government, the need should be met through higher payments", this recommendation, in the opinion of our Association would require a vast increase in the administration work of the Department of Veterans Affairs, due to the complex War Disability Compensation Pensions and additional benefits. We fail to comprehend how the higher payments would remedy the situation as additional payments would escalate income and place the recipients in higher Income Tax brackets.

The Army, Navy and Air Force Veterans in Canada strongly recommend that War Disability Compensation (Pensions) and other benefits under the Canadian Pension Act be maintained as exempt as income for Income Tax purposes, for reasons given and principally it has been a long-established accepted policy of the Government of Canada and there appear no justified reasons for change.

Representations and Evidence

War Amputations of Canada: With regard to the recommendation of the Royal Commission on Taxation that the income tax exemption for war disability pension be repealed, this Association forwarded a copy of a resolution which was approved at its directors' meeting on April 8th, 1967.

The resolution reads as follows: ⁶

WHEREAS, the Royal Commission on Taxation has recommended that "all forms of income" be taxable; and

WHEREAS, this report made specific reference to Workmen's Compensation and Unemployment Insurance, but did not refer to war disability pensions as such; and

WHEREAS, notwithstanding the absence of any specific reference in the Royal Commission Report, there is always the possibility that if the Report were accepted in principle, it could lead to the suggestion that war disability pensions should no longer be exempt from income tax; and

WHEREAS, traditionally war pensions have been paid as a debt of gratitude by a grateful country, in compensation for disability or loss of life; and

WHEREAS, although the basic rate of pension is presumably based on the loss of earning power in the untrained labour market, it is understood that this is solely a means of gauging the amount of pension which should be paid, and is not intended to mean that pension is income, or paid for the purpose of sustaining life;

THEREFORE, be it resolved that the War Amputations of Canada go on record as opposed to any suggestion that war disability pension should be taxed as income.

National Council of Veterans Associations in Canada: This Council wrote to your Committee, under date of May 23rd, 1967, in regard to the recommendation of the Royal Commission on Taxation that the exemption of disability pension from income tax be removed, as follows: ⁷

The recommendation made by the Carter Commission that all pensions and allowances paid under the Pension Act be considered as taxable income appears to endanger the entire concept of the Pension Act.

Having in mind all the intangibles of service to the country in time of war, the pain and suffering involved in being wounded in service and the substantial loss of enjoyment of life as a result of a serious residual disability, war disability pensions form a unique responsibility of the Government of Canada.

Representations and Evidence

The traditional levels of pension at the value of unskilled manual labour cannot hope to provide adequate compensation for the losses suffered by the war disabled. The payment of pension at this level and its exemption from direct taxation does however encourage the war disabled to assume the role of responsible citizens and to engage in such useful occupations, however limited, as their disabilities permit. To tax the pension itself serves to penalize rather than to encourage such efforts. I cannot believe that this penalty would be in the best interests of the people of Canada.

The attendance allowance and the clothing allowance paid under the Act are essentially a form of special damages to help meet the added disbursements occasioned by the disability and should not be taxable under any interpretation of income.

I know that you will be as concerned as we are regarding the implications of the Carter Commission recommendations and would hope that you will be able to deal with this matter in your report.

The Sir Arthur Pearson Association of the War Blinded: This Association also wrote to your Committee, under date of May 31st, 1967, to make known its views on the recommendation of the Royal Commission on Taxation that the exemption of war disability pensions from income tax be repealed. The Association's views are as follows: 8

For fifty years we have had to gradually build up an atmosphere of rehabilitation for the seriously disabled war blinded, by creating public confidence in their ability to perform, and by a gradual process of motivating and encouraging the blind to accept a job, however menial, regardless of their intelligence and abilities - latent and otherwise. With a few exceptions, the jobs are of the low-paid variety, monotonous, with no hope of promotions in the competition with sighted employees.

One of the paramount incentives has been that the seriously disabled war blinded could work and earn any amount, without in any way affecting his pension and allowances. If the War Disability Pension is to be subject to Income Tax - according to Carter recommendations - it will destroy the incentive, and the rehabilitation of the severely handicapped will be set back fifty years.

Representations and Evidence

I shudder to think of all the implications that would evolve from taxing the War Disability Pension. I feel certain that many who now, in a sense, merely augment their pension income, would terminate their employment, in spite of loss of self-respect. There is, however, an over-all exercising among our group of courage, determination and unwillingness to give in to all that their handicap entails, which I, personally feel should be encouraged rather than discouraged. They have never been complainers - but then, what else could be expected of men who volunteered to give their all - and almost did!

War Pensioners of Canada Incorporated

This organization forwarded a letter to your Committee under date of June 28th, 1967, which is quoted hereunder:

Our Association recognizes the diligence and consideration of your Committee in delving into the many aspects required for preparation of the Report. In addition, the co-operation extended by your Committee to all veterans organizations is sincerely appreciated.

From such experience, you will readily understand the concern of the War Pensioners of Canada, Inc., on the far-reaching effects of the recommendations of the Carter Commission that pensions and allowance under the Pension Act become taxable. It is felt that you too will view this proposal as seriously damaging the welfare of all recipients of war disability compensation.

The interim increase in pensions authorized by the Government in 1966 apparently acknowledges that the level of pensions is insufficient. If pensions become taxable, even the interim increase would be reduced, thereby retracting a good part of the acknowledgement referred to above.

Representations and Evidence

Our organization also wishes to draw attention to the hardship of such legislation on the War Blind, the War Amps, and its effect on their attendance, clothing and special allowance. The very thought is, indeed, revolting.

The War Pensioners of Canada Inc. respectfully request that your Committee consider including in your Report a strong recommendation that war disability compensation and allowance under the Pensions Act remain tax free.

Canadian Corps Association

This organization wrote to your Committee under date of July 5, 1967, concerning the proposal in the report of the Royal Commission on Taxation regarding income tax on pensions. The letter follows:

It has been brought to our attention from reports published in the press, that included in the Carter Royal Commission Tax Recommendations, is a proposal that the Government of Canada remove the exemption provision having reference to War Disability Pensions and that they become taxable income!

The Canadian Corps Association feels that this is a most unjust proposal. These men, in time of war, have already paid their debt in full to society and they should now not be subjected to taxation of the compensation that they were awarded for their respective sacrifices in defence of this country.

We trust, Sir, that you will include within your Survey Report, which we understand is now nearing completion, a firm stand AGAINST any proposal by the Government to adopt the Carter recommendation to make War Disability Pensions taxable.

In conclusion, the Canadian Corps Association wishes to record our sincere appreciation to you and your Committee as a whole, for the many months you have devoted to the study of the work and organization of the Canadian Pension Commission and we will look forward most enthusiastically to the opportunity of studying your completed survey report.

HISTORY

The Income War Tax Act was passed in 1917. The first Pension Act ⁹ was approved under date of July 7th, 1919. An amendment to the Income War Tax Act was passed in 1919 providing an exemption from income tax for pensions paid for disability or death arising from military service. The amendment read as follows: ¹⁰

4. Section five of the said Act is amended by adding thereto the following paragraph:--
 "(1) Income derived from any pension granted to any member of His Majesty's military, naval or air forces for any disability suffered by the pensioner while serving in any of His Majesty's forces during the war that began in August, one thousand nine hundred and fourteen, and the income derived from any pension granted to any dependent relative of any person who was killed or suffered any disability while serving in the said forces in the said war."

The amendments in the Income War Tax Act proposed in Bill 144 submitted to the House of Commons in 1919 contained no provision for an exemption for pension payments. During the second reading of the Bill on June 19th, 1919, Sir Herbert Ames, M.P., St. Antoine, suggested that pensions for disability or death arising from military service should be exempt. This suggestion was supported by Hon. Rudolphe Lemieux, M.P., Maisonneuve - Gaspé. The proposal, as outlined by Sir Herbert Ames and supported by Mr. Lemieux, was set out in the Report of Debates of the House of Commons of that date as follows: ¹¹

Sir Herbert Ames: In the original Income Tax Act there are two clauses which allow for exemption -- clauses 3 and 5. We have been dealing with clause 3. I do not see that clause 5 is dealt with at all, but it relates to exemptions. I would like to make a few observations with regard to a matter that I desire to call to the attention of the Minister of Finance (Sir Thomas White). Paragraph (j) of clause 5 provides that:

History

The military and naval pay of persons who have been on active service overseas during the present war in any of the military or naval forces of His Majesty or any of His Majesty's Allies.

---shall be exempt from taxation. I would to put in a plea for the same provision with respect to the pension that may be awarded to the widow of a man who has been killed in service, or afterwards, or the pension that is derived by a person who is disabled. It is quite possible that there may be a little other revenue in addition to the pension. If the widow of a colonel or a major has an income derived from life insurance, her pension income and life insurance income might bring the amount up to the point where a portion of her income would be taxed. I think the principle having been once adopted that the military pay of persons engaged in the war should not be taxed, the same principle should be applied to pensions and disablement allowances. Strictly speaking, the Government simply pays with one hand and takes back with the other. As these deserving people will have to live mainly upon the pension allowance. I do not think this Government should exact from them sums that might otherwise be properly collectable, and I would ask the minister, when the Bill comes down, to please include a clause to that effect.

Mr. Lemieux: I wish to support with all my heart the proposal or suggestion made by my hon. friend from St. Antoine (Sir Herbert Ames). I think that just as the military pay was placed beyond the reach of the tax collector so ought the pension paid to the widow. As my hon. friend says, that pension at the present time, until further amendment -- and I hope amendment may come -- is small and gives the recipient just the bare necessities of life. Under these circumstances I would certainly support any amendment which would provide for an exemption in favour of the widow who receives a pension.

Sir Thomas White: I am disposed to regard very favourably the suggestion put forward by the two hon. members. The hon. member for St. Antoine (Sir Herbert Ames) had drawn the matter to my attention and it strongly appeals to me. It is not necessary to make any amendment to the resolution, because it is open to us, when the Bill is in the committee stage, to extend the exemptions by cutting down and not adding to the burdens of taxation. I will have a note made of the suggestions and get an appropriate amendment to the Bill when it is in the committee stage.

When Sir Thomas White, the Minister of Finance, was presenting amendments to the Income War Tax Act on June 24th, 1919, he proposed an amendment to Section 5 of the Act (such amendment being adopted without change as set out above) and stated: 12

History

I think that meets the suggestion put forward by the Honourable Member for St. Antoine (Sir Herbert Ames) and concurred in by the Honourable Member for Maisonneuve (Mr. Lemieux).

This provision was amended by Bill 158 of the House of Commons in 1920 but there was no change in intent. The new provision read:¹³

1920

- (1) any pension granted to any member of His Majesty's military, naval or air forces for any disability suffered by the pensioner while serving in any of His Majesty's forces during the war that began in August, one thousand nine hundred and fourteen, and any pension granted to any dependent relative of any person who was killed or suffered any disability while serving in the said forces in the said war.

Sir Henry Drayton, the Minister of Finance, in moving the second reading of Bill 158, stated:¹⁴

Paragraph (1) reads:

--income derived from any pension granted to any member of His Majesty's military, naval or air forces.....and the income derived from any pension granted to any dependent relative of any person who was killed or suffered any disability while serving in the said forces in the said war.

As it reads now, it says that the "income from pensions" shall not be taxable, but it is the pension itself that should not be taxable, and so we say that no pension so earned shall be taxable. Instead of reading "income derived from any pension", it will now read: "any pension" granted to any member of His Majesty's military, naval or air forces or to any relative, and so forth. It would be manifestly unjust to tax those pensions. They are used annually; they are not invested. The idea is to make it clear that the soldiers' pensions are not taxable.

In 1923 a further amendment to the Income War Tax Act was passed, exempting pensions granted to Forces of His Majesty's Allies from income tax.

1923

History

The Salary Deduction Act of 1932¹⁵ provided for a 10% reduction from the remuneration of every member of the Public Service of Canada, as an economy measure due to economic conditions. A similar deduction was effected in the pay and allowances of officers of the Armed Forces and members of the Royal Canadian Mounted Police.

A proposal was made in the budget brought down in the House of Commons March 21st, 1933, to the effect that pension payable to persons in the employ of the government would be suspended.¹⁶

This proposal led to discussions with veterans organizations, concerning the question of a reduction in pensions paid for disability or death arising from military service. Your Committee was unable to find an official record of this discussion. It would appear, however, that the veterans organizations agreed that, rather than decrease pensions, the exemption from income tax should be repealed.

The amendment which repealed the income tax exemption for pension was introduced in the House of Commons on May 5th, 1933, by the Honourable Edgar N. Rhodes, the Minister of Finance. He stated at that time:¹⁷

I have an amendment to move to this resolution,
Mr. Chairman, as paragraph 20. It is as follows:

20. That the exemption heretofore afforded
with respect to war pensions be repealed.

It will be within the knowledge of the committee that this is part of the arrangement which was arrived at after conferences with the representatives of the several veterans' organizations.

He gave further explanation as follows: ¹⁸

Conferences were held with the heads of the various veteran organizations who agreed to the proposal that pensions should be subject to income tax. This action was taken for the very reasons given by my hon. friend. It was felt that this tax would have a bearing only upon those whose incomes were large enough to be subject to income tax. It will not touch the great majority of pensions

History

These proposals will have no bearing at all except in the case of a returned soldier who has in addition to his pension an income from private or other sources running into substantial figures. We are asking for a contribution from the individual who can well and properly afford to make one by way of income tax.

The legislation to repeal the exemption in income tax was introduced in the House of Commons as Bill 96.¹⁹ The Bill contained no explanatory note regarding the amendment which read as follows:

(1) of Section 4 of the Income War Tax Act is repealed.

This matter was dealt with in the address of Major J.S. Roper, Dominion President of the Canadian Legion, to the Fifth Dominion Convention of that organization on March 12th to 15th, 1934. Major Roper's address made reference to the proposals in the budget speech of the Minister of Finance, to the effect that pension paid to persons employed by the Federal Government should be suspended in view of the economic depression of the country. Major Roper's comments in his Presidential Address, relative to the budget proposal, are set out below:²⁰

It will be remembered that during the Session of 1933 considerable consternation was caused in the ranks of ex-servicemen by an announcement in the Budget Speech of the Honourable The Minister of Finance, that certain measures would be taken affecting the pensions of all pensioners in the employ of the Dominion Government, during the period of such employment. This measure, which I may truthfully say came to us as a bolt from the blue, constituted, in our opinion a violation of a principle which had been laid down during the war itself and which had been confirmed on numerous subsequent occasions, and upon which the whole structure of our system of pension awards was founded. I mean by this that, in laying down the existing pension scale it was distinctly understood, and in fact provided in the Statute itself, that a pension should not be affected in any way by the ability of the pensioner to perfect himself in any industry or occupation. No question had ever been raised before as to the soundness of this principle; for it is obvious that if the only remaining alternative were adopted then pensions would have to be paid in each case on the basis of the individual earning capacity of each pensioner, according to his qualifications. This would be an almost impossible task

History

from an administrative point of view and, in addition, would result in a wide disparity of awards as between soldiers of the same rank. For instance, a labourer would be pensioned simply on the basis of his ability to perform ordinary labour, whereas a distinguished musician or a distinguished surgeon would have to be pensioned on the estimated loss of earning capacity in those particular professions. Thus a uniform scale was laid down for all, subject only to variation in rank, the basis being the ability of the pensioner to perform ordinary labour; on the explicit condition, as I said before that if, notwithstanding his condition, the pensioner could improve his position in life he was permitted to do so without prejudice to his pension.

It is not necessary to enlarge extensively on subsequent events as they are well known. Let it be sufficient to say that the Legion, together with the Organizations with whom we were associated, came to the conclusion that the vital principle involved could not be willingly relinquished. We considered not only would the proposal have the effect of nullifying a principle established over many years, but we also felt that the example would swiftly be followed by Provincial and Municipal Authorities and by employers of labour generally. After deliberating the matter most thoroughly we decided to ask for an opportunity to lay our views before the Government, before action on the Budget proposal was taken. This request, I am pleased to say, was at once granted. Interviews took place between the Right Honourable the Prime Minister, the Honourable the Minister of Finance and ourselves, when the whole matter was thoroughly discussed, and our views were set out in a Memorandum, which was presented to the Government, and which was circularized to the entire Legion. During these discussions the honour was again conferred upon me of acting as Spokesman for our Delegation. In our representations we made it abundantly clear that we were fully cognizant of the financial crisis through which the Country was passing; and we were fully convinced that, if a national necessity were shown, the ex-servicemen of Canada were quite willing to make sacrifices, providing all other classes of our people were asked to make corresponding sacrifices. We were not able to agree, however, to the abolition of the principle involved in the present issue. I say very frankly, and very gladly, that the reception of our representations was courteous and considerate in every way, and as is now well known, the proposal was ultimately withdrawn in its entirety. Coincidentally, however, we considered it incumbent upon us to agree, that no additional pension to wives of pensioners married after May 1st, 1933, and to children of pensioners born after that date, should be paid and also that pensions should become subject to Income Tax.

History

Again I point out for the benefit of all those interested, that in these discussions and negotiations with the Government, which were undertaken by us only because of our responsibility for the maintenance of the principle involved, we were not seeking to establish further rights, or to ask for further expenditure. We were simply carrying out our bounden duty to preserve, if possible, rights which already existed; and whilst we were successful in this, we at the same time made a concession in regard to pension allowances which has had, and will continue to have the effect of saving to the Country a substantial sum of money.

Let those who criticize us bear this in mind also. This incident, whilst on the whole it resulted satisfactorily from our point of view, nevertheless did not tend to settle the minds of ex-servicemen, already unsettled as they were by the general situation in regard to the pension administration, to which I have referred previously.

Mr. J. L. Ilesley, Minister of Finance, announced in his budget speech in the House of Commons on June 23rd, 1942 that the government was planning to recommend reinstatement of the income tax exemption in respect of war service pensions. His statement follows: ²¹

1942

In addition to the changes in the rate structure and the other proposals which I have just mentioned there are several other items which are of general interest. I am pleased to announce that I am going to recommend to the house an exemption from all taxes under the Income War Tax Act in respect of war service pensions, regardless of whether they arise out of the past war or the present one. I feel sure that this will meet with a hearty response not only in the house but in the country as a whole.

This amendment was introduced in the form of Bill 115 and given first reading under date of July 22nd, 1942. The Bill gave no explanation concerning the amendment, which was approved by the House of Commons under date of July 31, 1942, as follows: ²²

- (2) Section four of the said Act is further amended by adding thereto the following paragraphs:

History

"(1)(i) Pensions granted or payable under the provisions of the Pension Act, or other payments in the nature of pensions which were being administered on the thirty-first day of July, one thousand nine hundred and forty-two, by the Canadian Pension Commission as directed by the Governor-in-Council, under Section six of the Pension Act;

(ii) Pensions granted or payable on account of disability or death arising out of war service by the government of any country which was an ally of His Majesty at the time of such war service; Provided, and to the extent that, such country grants a similar exemption in respect of such pensions payable by the government of Canada."

COMMITTEE RECOMMENDATION

(143) That the statutory exemption from income tax for payments
made under the Pension Act be continued.

Exemption
From
Income Tax
be Continued

COMMENT

It is the view of your Committee that the basis upon which pension is paid in Canada is sufficiently unique to remove such pension from classification as "income" in so far as this term is used to describe monies received by an individual upon which a tax is imposed.

As in other countries, Canada has exempted pensions paid for disability or death arising from military service from taxable income. The only exception in the forty-eight year history of the Pension Act was during the depression of the 1930's, when this exemption was removed as a temporary alternative to a reduction in the basic rate of pension, similar to the reductions made in the pay of employees of the Federal Government.

The Royal Commission on Taxation, in its Report of December 22nd 1966, recommended that: ²³

The comprehensive tax base we recommend should encompass all forms of income, and therefore in principle all exclusions and exemptions should be terminated.

Taking into consideration all aspects of the Pension Act, it would not appear that monies paid in the form of pension under this Act could properly be considered as one of the "forms of income" for the purpose of taxation.

Comparison with Other Forms of Income

The income of an individual may fall into a number of classifications including:

1. Monies earned for services rendered.
2. Workmen's Compensation.
3. Monies paid as retirement income through a pension plan designed to replace earnings on retirement.
4. Allowances paid in the form of a social benefit to replace income where the recipient is unable to earn sufficient for his needs.
5. Unemployment Insurance benefits.
6. Monies received as the proceeds of an insurance policy.
7. Monies paid as investment income, as a rental for funds owned by the tax payer and used by others.

Comment

8. Monetary gifts.
9. Monetary rewards for some specific act.
10. Bursaries or scholarships.
11. Alimony or separation allowances.
12. Monies received as part of a profit sharing plan.
13. Winnings from gambling.

Your Committee's examination appears to indicate that monies paid under the Pension Act would fit into none of the above classifications, although there are similarities to some.

Replacement of Earnings: For example it might be said that, in a sense, pension is intended to replace earnings. This is true only in part. The pensioner receives his payment under the Pension Act partly for subsistence, but also as a mark of gratitude for services rendered, and partly as fulfillment of a debt owed to him by reason of an implied contract to the effect that, should he become disabled or lose his life, recompense would be made by the Government.

This implied contract gave no indication that the pension was intended as replacement of his earnings, as is the general principle of Workmen's Compensation. In fact, it has been a cardinal principle of the Pension Act, since its inception in 1919, that the occupation of a person previous to his becoming a member of the forces does not effect the amount of pension awarded to him. Section 17 of the Act reads as follows: ²⁴

17. The occupation or income or condition in life of a person previous to his becoming a member of the forces does not in any way affect the amount of pension awarded to or in respect of him.

Also, an examination of the basis upon which the rate of pension is calculated appears to indicate that all pensioners are considered in one classification, i.e., that of the untrained labourer. The basic concept is that members of the Armed Forces are considered to have enlisted with

Comment

the mind and physical capabilities of an able bodied person and any recompense for disability or death is based on the medical assessment of any lessening in those capabilities.*

Retirement Income: Monies paid under the Pension Act could not be considered as retirement income which, usually, is paid on a contract basis to provide continuing income after long service with an employer. A simple test which appears to negate any suggestion that monies paid under the Pension Act represent retirement income is whether an ex-member of the forces can qualify merely on the basis of having served for a period of time in the Armed Forces. The answer is, of course, that he cannot - and pension under the Pension Act can be paid only if there is disability or death.

Welfare Benefits: In the ordinary sense, the Pension Act is not social legislation. A comparison with monies paid under the War Veterans Allowance Act appears to establish the difference. Pension is paid as a matter of right, on the basis of the extent of the disability. War Veterans Allowance is paid on the basis of need. Pension paid to a disabled ex-serviceman is intended as a form of payment to him in lieu of the loss of a physical part or the lessening of the power to do some physical or mental act. The definition of "disability" under the Pension Act is as follows: ²⁵

2(j) "Disability" means the loss or lessening of the power to will and to do any normal mental or physical act;

* See Volume 2, Part VI, Chapter 13, Re: "Basic Rate of Pension" for further information.

Comment

Conversely, monies paid under the War Veterans Allowance Act - and other similar forms of social legislation, including unemployment relief - are presumably intended to provide income where it has been shown on the basis of a "means test" that no other form of income is available.

Implied Contract: Compensation for disability or death under the Pension Act has, upon occasion, been compared with accident or life insurance, presumably on the basis that a contract - implied in the case of the Pension Act, actual in the case of insurance - exists. In the view of your Committee, the similarity does not go beyond this comparison. The basic difference in the two can perhaps be summed up in the term "gratitude". Whereas both pension and insurance monies are paid upon the basis of an understanding or contract, the former would seem to have a far deeper significance. That is to say, a country could never make compensation for a disability or death arising from military service in the terms of money alone. An insurance contract makes a specific provision in terms of dollars; so many dollars for the loss of a leg; so many dollars for the loss of a life.

The Pension Act does provide a specific amount in terms of a disability assessment for the loss of a leg. Also, a specific amount is set out as part of the legislation for the loss of a life. It has never been suggested, however, that the Government's responsibility ends with the payment of this specific amount. No one could determine the value of a life - or even of a leg - lost in the service of one's country. Presumably, there is no intention of doing this under the Pension Act, despite the fact that specific amounts are set aside as

Comment

compensation for these losses. It seems logical to take the view, therefore, that whereas an insurance contract is set out in specific terms, the implied contract to make recompense for the loss of a physical capability or of a life in military service, must be regarded only as token payment for sacrifice given in the highest form of service to the state.

It perhaps bears repetition that, in the view of your Committee, monies paid under the Pension Act should not be considered as income in the normal sense that this term is used to describe monies which are taxable in that they form part of the personal monies coming into the possession of an individual as:

pay for work done;

income replacement on retirement;

an allowance because the person is unable to earn other income;

a return on monies invested; or

the proceeds of a gift, reward, gambling winnings or insurance.

Contributory Programmes

Your Committee notes another distinction between pension and some of the other forms of income to which reference is made in the Report on the Royal Commission on Taxation. The Report uses the term "Government Transfer Payments" and defines these as follows:²⁶

Government transfer payments are defined to include cash payments by governments to individuals other than those made in exchange for goods or services. Among the more obvious and important transfer payments are the following: family allowances, old age security benefits, unemployment insurance benefits, workmen's compensation benefits and social assistance and relief of all kinds.

The Report suggests that²⁷ the recipient of a transfer payment should include the benefit in his income because it increases the taxable capacity of the individual or the family.

Comment

The Report suggests, also that:²⁸ "specific contributions to transfer programmes should be deductible from the individual's tax base".

This system by which the income received would be taxable, but the contribution would be deductible from the individual's income tax, would apply to that type of government transfer payment which is contributory in nature, e.g., unemployment insurance and workmen's compensation. If pension became taxable, there would be no offsetting deduction for contributions - as pensions are non-contributory. This would seem to indicate that, in comparison with unemployment insurance and workmen's compensation, the pensioner would be at a disadvantage.

Historical Basis For Exemption

The original provision to exempt pensions from income tax, which was approved by the House of Commons on June 24,²⁹ 1919, presumably came about at the suggestion of Sir Herbert Ames, Member of Parliament for Saint Antoine, and was supported by the Honorable Rudolphe Lemieux, Member of Parliament for Maisonneuve-Gaspe.*

In speaking to the proposal, Sir Herbert Ames cited the fact that the pay of persons who had been on active service overseas during the war was exempt from taxation, and suggested the same principle should be applied to pensions. No other basis for the exemption was advanced at that time.

In 1920, when this provision in the Act was being subjected to a minor amendment for clarification, Sir Henry Graydon, the then Minister of Finance, suggested that it would be "manifestly unjust" to tax pensions paid for a disability or death arising from military service.

* See page 1156 hereof.

Comment

He suggested that the reason was that the pensions were required to meet the living expenses of the pensioner. His actual words were:*

"They are used annually; they are not invested".

The provision to exempt pensions from income tax was repealed in 1933. This was not done for the reason that the exemption was considered to be unsound. An examination of the discussions which led to this repeal, as set out on pages 1159 and 1160 hereof, will indicate that this was carried out as an economy measure to conserve funds during the depression of the 1930's. The Government had originally intended to suspend pensions paid to those in the employ of the Federal Government and possibly to propose a general decrease in pensions. This course of action was discarded and, as an alternative the income tax exemption was removed - a measure designed to provide that those pensioners who were in receipt of additional income from other sources would bear the major burden of a readjustment in pensions during the period of economic depression.

The income tax exemption was reinstated in 1942, presumably on the basis that the economy of the country had improved to the point where the taxing of pensions was no longer required. In announcing this measure the Honourable J.L. Ilsley, Minister of Finance stated:**

I feel sure that this will meet with the hearty response not only in the House but in the Country as a whole.

In reviewing the historical basis for this exemption, your Committee notes that there has never been a published explanation of the reasons in support of the measure. This is possibly because, at its inception in 1919, and again at its re-instatement of 1942, the reasons appeared self-evident.

* See page 1158 hereof.

** See page 1162 hereof.

Comment

As Sir Herbert Ames stated, when making the original proposal:*

Strictly speaking, the Government simply pays with one hand and takes back with the other.

It might also be taken from the statement of the Honourable J.L. Ilsley, Minister of Finance in 1942, that this was a measure which would meet with a "hearty response" throughout the country. The fact that, apparently, there has never been published reasons for this exemption should not, in the view of your Committee, be considered as an indication that there is no basis for this exemption, other than the brief explanations given when the measures were before Parliament.

Your Committee believes that there are many reasons which support this exemption - as set out herein - and it is entirely possible that, in approving the measure, the legislators had many of these reasons in mind, even if there were no recorded statements to that effect.

Considerations Regarding Net Income From Pension

Pension differs from other forms of income in one other major respect; that is, that a considerable portion of the pension paid to a disability pensioner is absorbed in meeting the added costs of his disability or in taking the place of additional income which he might otherwise have been able to earn, had he not been disabled. In other words, his pension is offset to a degree by added expense, or a lessening in his potential income. It is perhaps unnecessary to go into detail in this respect. It seems self-evident that, in the matter of transportation alone, a pensioner would logically use up a considerable amount of money in furnishing himself with a more expensive means of transport than would be necessary were he not disabled. Also, he presumably finds it necessary to make more use of this transport than ordinarily would be the case.

* See page 1157 hereof.

Comment

The effect of a disability on the pensioner's mode of living would be pertinent also. Because of physical disability, he may be unable to take part in sports or activities of an outdoor nature and finds, as an alternative, that he must resort to more costly means of recreation.

The Disability Measured in Terms Other Than Those of Employment

Your Committee considers that, even if pension were paid only as "income replacement" for loss of earning capacity, there would be very little justification for making it subject to income tax. There is even less justification, when it is considered that pension is intended as recompense for many other factors which are inherent in a disability. It is generally accepted that these include:

- (1) The loss of enjoyment of life: A disability often places severe prohibitions upon a pensioner in respect of those pursuits which are available to him in the fields of recreation, entertainment and similar interests.
- (2) Anatomical Loss: In this respect, compensation is made for the loss or loss of use of limbs or other parts of the body, without relationship to any consequent loss of earning power.
- (3) Scarring and Disfigurement: This type of disability often produces a psychological problem which may bear little or no relationship to the pensioner's economic situation. It is believed that, in a broad sense, pension is intended to compensate for this form of disability. This is another factor which the pensioner must bear on a "Twenty-four hour a day" basis. This may or may not decrease the pensioner's capacity to earn his living - but it is an integral part of the disability.
- (4) Pain and Discomfort: This is another factor in a disability which may have no effect on the pensioner's livelihood, but which, notwithstanding, is believed to be included in the broad assessment for pension purposes.

Comment

- (5) Expected Shortening of the Life Span: Many severe disabilities carry a potential shortening of the life-span and, although there is no specific provision in Canadian pension law to compensate for this, it again is an inherent disability which bears no relationship to earning capacity.

Tax on Pensions Would Penalize Achievement

It has been one of the cardinal principles of the Canadian pension system that a pensioner is encouraged to rehabilitate himself. Section 28(4) of the Act reads as follows: 30

28(4) No deduction shall be made from the pension of any member of the forces owing to his having undertaken work or perfected himself in some form of industry.

It could be stated that to impose income tax on pension would be contrary to this Section in the sense that a pensioner, having undertaken employment, would have placed himself in a taxable income bracket. If, on top of his income from employment, a tax is imposed on his pension, this would represent one form of deduction from such pension. The deduction would not be effective if he had not, in the first instance, earned other monies from employment.

The principle seems well established that pension is payable as a matter of right, and the amount of pension paid to a pensioner has no relationship to his income. In this respect statements in a letter written by Mr. L.A. Mutch, Deputy Chairman of the Pension Commission under date of March 30, 1961, are pertinent. Mr. Mutch was referring to a case where a pensioner's complaint was that his assessment should be increased because of his financial need. Part of Mr. Mutch's reply is quoted here-under: 31

The burden of his complaint seems to be that pension
"assessment does not take into account the financial

Comment

position of the veteran". This is of course true. The Act is specific, it requires the Commission to pay an award of pension in accordance with the disability found upon examination.

Disability in turn is defined in the Act as follows: "Disability means the loss or lessening of the power to will and to do any normal, mental or physical act".

In short the disability is assessed in terms of common labor. The engineer who loses an eye or the concert violinist who loses a hand receives the same pension as an unskilled worker with like disability. This concept is common to all war disability pension legislation. It is perhaps based upon the fact that pension is compensation for injury or disease rather than an attempt to compensate for possible or actual loss of income.

The principle that pension is paid without relation to financial circumstances was put to the test with the establishment and subsequent cancellation of the "unemployability supplement". On July 4, 1951, under the Appropriation Act,³² "The Unemployability Supplement Regulations" were established. These Regulations governed the payment of financial assistance to a veteran in receipt of pension under the Pension Act, in respect of a disability that was a factor contributing to his unemployability. The supplement was paid at the rate of \$40.00 per month (married rate) and \$20.00 per month (single rate) if unemployed.

The Regulations were cancelled on January 2nd, 1952, per Order in Council P.C. 7005, dated December 28, 1951. This Order in Council stated that the Unemployability Supplement Regulations, established to provide for the payment of financial assistance to unemployable veterans in receipt of pensions under the Pension Act, were cancelled following the provision for a general increase in pensions, effective December 31,

Comment

1951. The Order stated that, "in view of the general pension increase, the aforesaid financial assistance (Unemployability Supplement) will no longer be needed".

The Unemployability Supplement Regulations represented the only instance where a Canadian Government attempted to provide direct financial assistance to pensioners on the basis of need. The Order in Council cancelling these regulations indicated that their discontinuance was brought about by a general increase in pension. It may be true, also, that the Unemployability Supplement was not a successful venture. If so, it seems possible to suggest that the experience with the institution and subsequent revoking of this Unemployability Supplement can be taken as one further indication that the payment of pension bears no relationship to the financial means of the recipient.

Assuming that it has been successfully established that pension is paid as a matter of right, and that the financial status of the pensioner is not a consideration, it would seem incorrect to effect a reduction in this pension by means of the imposition of an income tax.

Compensating Pension Increase if Tax Imposed

The Royal Commission on Taxation, in its recommendation that income (including pensions paid under the Pension Act) should be taxed, states that: "If specific relief were required in respect of payments by the Government, the need should be met through higher payments".

This aspect is examined hereunder in several areas:

1. The effect upon pensioners in different income tax brackets

The report of the Royal Commission on Taxation made no specific suggestion as to how its recommendation concerning a possible compensating

Comment

increase in pension might be carried out. If it is intended that the compensating increase would be made on an individual basis, it is difficult to visualize the administrative procedure which would be followed. For example, would a 100% pensioner who is also in receipt of taxable income of \$5,000. per annum from employment be allowed to claim extra pension to replace the amount of additional tax which he would have to pay, if his pension were included as taxable income? The administrative complications of such procedure appear frightening.

If it is intended that any such compensating increase in pension would be applied generally, the increase would presumably assist those who have no income other than pension, but would be of less value to the pensioner with other income - particularly as it would again increase his taxable income and would simply result in his having to pay back to the Government more of the funds which are presumably due him by reason of a disability.

In this respect your Committee notes the words in the Report: "If specific relief were required." This can perhaps be taken as an indication that any increase in pension to compensate for the amount which would have to be paid back in income tax on the pension is intended to be applied only in cases where the tax on pension would result in insufficient income to meet the pensioner's need. Such action would, of course, be contrary to the principles of the pension system, as once again it would introduce the question of financial need as a basis for payment of pension.

Comment2. Comparison with War Veterans Allowance

Your Committee notes that the recommendations in regard to the imposing of tax on pensions is incorporated in a broader recommendation touching upon pension and allowances now exempt under Section 10(1)(d) of the Income Tax Act. This latter provision includes not only the Pension Act, but also the War Veterans Allowance Act.

Your Committee suggests that, in view of the totally different basis of payment between pensions and War Veterans Allowance, these payments should be viewed differently in regard to income tax exemption. The general principle enunciated in the report of the Royal Commission on Taxation, to the effect that if the imposition of income tax creates financial hardship, relief could be provided through higher payments, would be more readily applicable to War Veterans Allowance than to pension. The former is paid on the basis of need and, in view of the income ceilings and limitations on assets, the recipient would not normally be in receipt of sufficient income, with his War Veterans Allowance plus any permissible other income, to pay tax.

War Veterans Allowance is a social welfare measure to provide income to meet living expense. On the other hand, many pensioners will be in a taxable bracket on the basis of the income which they manage to earn, regardless of the fact that they are disabled. Hence the proposal to tax pensions would represent a much more severe penalty against the pensioner than an income tax on War Veterans Allowance would represent for the recipient of that benefit.

Concerning this question of living expense, it has been established, as explained heretofore in this report, that pension is paid only partly for this reason - and it is paid also for loss of enjoyment of life, anatomical loss, scarring and disfigurement, pain and discomfort and

Comment

expected shortening of the life span. Pension is also paid as a mark of gratitude for service rendered to the State, and as a debt, in fulfillment of an implied contract.

Comparison With Armed Forces Pay

It is important, in the view of your Committee, that an exemption from income tax for pension should not be regarded as a concession. Your Committee considers that the exemption which was granted for pay and allowances for members of the Armed Forces - and the exemption for pension which flows from the granting of a similar exemption for military pay - is well founded.

It is necessary, firstly, to examine the basis of pay for members of the Armed Forces. Canada has traditionally recruited personnel for its Armed Forces on a voluntary basis. Men and women who enlist do so out of a desire to serve their country. They do not expect to be paid for their services on a fully adequate basis, having regard for the fact that they are engaged in a job which may require them to lay down their lives. Hence, the remuneration for members of the Armed Forces is in a special category and is, in some respects, in the form of a token payment only.

Most service personnel, when they engage for service, are doing so with an implied willingness to serve on the expectation that the pay and allowances will be less than they could earn in civil life. It is a type of employment which is undertaken very largely out of patriotic motives. All of these considerations have presumably been taken into consideration in the decision to exempt Armed Forces pay in wartime from income tax.

Comment

The exemption of pension from income tax has been extended on the same basis. Pension for disablement is, in effect, a continuation of the pay received in the military services, under conditions where the serviceman has suffered disablement. Pay for a widow or other dependants is also an extension of military pay, where the member has died from causes due to service. Accordingly, as with military pay, pension for disablement or death is a special form of emolument.

The basis upon which the amount of pension for total disablement is determined, is the rate of pay in the unskilled labour market; that is to say, the common denominator of all pensioners is the unskilled worker. This would seem ample justification for the claim that pension is not intended to provide an income up to the level that the pensioner could have earned had he not been disabled. Hence, pension - in the same manner as military pay - is of a unique character. Thus, it is deserving of exemption from income tax - not as a concession - but as of right.

The Report of the Royal Commission on Taxation states: 33

Throughout this Report we have tried to minimize the significance of the source of a man's income; it is the change in economic power that counts.

This concept may be acceptable in regard to many forms of income received by an individual. Your Committee suggests, however, that it should not apply to pension paid for disability or death due to military service. If pension could be considered in the form of "actual compensation" to replace the full potential of the loss of earning power of the member of the Forces, there may be some justification for its inclusion as taxable income. As has been pointed out

Comment

herein, however, pension represents monies to compensate for loss extended not only to replace earnings, but partly as a mark of gratitude and partly in payment of a debt owed by a grateful nation on behalf of those who were disabled or who lost their lives in the service of their country. In view of this, your Committee does not consider that the significance of the source of income, in so far as the Pension Act is concerned, should be ignored.

There is another aspect which comes to the fore in any examination in respect of whether pensions should be taxable. It seems appropriate that pensioners would have the right to suggest that any attempt now to tax their pensions would be a violation of a contract between themselves and Canada. As has been suggested earlier - pension, by tradition, is not taxable. Disabled ex-servicemen - or bereaved widows - who were awarded pension by reason of a casualty due to service, were faced with two alternatives. Either they could decide to live on the pension, or alternatively, they may well have tackled a difficult rehabilitation adjustment - assuming meanwhile that the amount of their pension would not be affected by any income which they may have been able to realize through their rehabilitation efforts. To impose a tax upon these pensions now would be to penalize the successful efforts of those who suffered the most by reason of service given to the state.

EXEMPTION OF PENSION FROM INCOME TAX

REFERENCES

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2. Report, Royal Commission on Taxation, December 22nd, 1966.
3. Ibid, Page 531
4. Letter dated April 26th, 1967 from the Royal Canadian Legion to your Committee.
5. Letter dated April 28th, 1967 from the Army, Navy and Air Force Veterans in Canada to your Committee.
6. Letter dated April 25th, 1967 from the War Amputations of Canada to your Committee.
7. Letter dated May 23rd, 1967, from the National Council of Veterans Associations in Canada to your Committee.
8. Letter dated May 31st, 1967 from the Sir Arthur Pearson Association of the War Blinded to your Committee.
9. SC 1919, C.43, assented to July 7th, 1919.
10. SC 1919, C. 55, s.4, assented to July 7th, 1919.
11. House of Commons debates, June 19th, 1919, Page 3722.
12. Ibid, June 24th, 1919, page 3994.
13. SC 1920, C.49, s.9, assented to July 1st, 1920.
14. House of Commons debates, June 8th, 1920, Page 3253.
15. SC 1932, C.52, assented to May 26th, 1932.
16. House of Commons debates, March 21st, 1933, Page 3223.
17. Ibid, May 5th, 1933, Page 4631.
18. Ibid, May 5th, 1933, Page 4633.
19. Bill 96, House of Commons, Fourth Session, 17th Parliament, 1933.
20. Proceedings, Fifth Dominion Convention of the Royal Canadian Legion, 1934, Pages 84 and 85.
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22. SC 1942, C.28, Assented to August 1st, 1942.
23. Report, Royal Commission on Taxation, 1966, Volume 3, Page 531.
24. RSC 1952, C. 207, s.17.
25. Pension Act, Section 2(j).
26. Report, Royal Commission on Taxation, 1966, Volume 3, Page 521.
27. Ibid, Page 523
28. Ibid, Page 523
29. House of Commons Debates, June 24th, 1919, Page 3495.
30. Pension Act, Section 28(4).
31. Committee Case File No. 13.
32. The Appropriation Act, Number 4, 1951, Vote #822.
33. Report, Royal Commission on Taxation, 1966, Page 525.

CHAPTER 40PENSION REDUCED WHILE HOSPITALIZEDGENERAL

Subsections (1) and (2) of Section 33 of the Pension Act provide that, where a pensioner is in hospital for medical treatment of a pensioned condition, and he is entitled to monies as a "treatment allowance" from the Department of Veterans Affairs, his pension shall be reduced to an amount equal to that of the treatment allowance.

These sections read as follows:¹

- 33(1) During such time as, under departmental regulations in that behalf, a pensioner is entitled to treatment allowance while an in-patient under treatment from the Department and his pension including the pension, if any, for his dependants, is greater than the treatment allowance awardable by the Department, pension shall be reduced by an amount that will make such pension equal to the treatment allowance.
- (2) During such time as, under departmental regulations in that behalf, a pensioner is an in-patient under treatment in respect of a disability other than his pensionable disability, his pension, if in excess of the amount he would have been entitled to receive by way of treatment allowance, if the disability for which he is under treatment had been pensionable, shall be reduced to such amount; pending a fresh award, the payment of pension in full shall recommence forthwith upon the pensioner's ceasing to be an in-patient.

Prior to August 1, 1955, the effect of these sub-sections of the Act was to reduce 100% pension by \$15.00 a month, in that the treatment allowance was based on an amount equivalent to 100% pension, but was subject to a \$15.00 monthly deduction while the pensioner was an in-patient in hospital.

On August 1, 1955, the Veterans Treatment Regulations were amended to provide that, where pension was in payment at a rate equal to or exceeding the treatment allowance rate (including a \$15.00 monthly deduction), pension would continue in payment during the hospitalization, in lieu of the treatment allowance.

General

The treatment allowance provisions under the Veterans Treatment Regulations ² are as follows:

- 31(2) The allowance payable pursuant to subsection (1) shall be in an amount equal to the sum of
- (a) the rate of pension that would be payable to a veteran or qualified person described in that subsection for one hundred percent disability under the Pension Act or the Civilian War Pensions and Allowance Act, not including an amount in respect of additional pension;
 - (b) an amount in respect of a dependant of a veteran or qualified person described in that subsection other than a child, parent or person in place of a parent, equal to the amount that would be payable as additional pension in respect of one hundred percent disability for a married member of the forces or a wife under the Pension Act or the Civilian War Pensions and Allowances Act;
 - (c) an amount in respect of a dependant of a veteran or qualified person described in that subsection who is a child, parent or person in place of a parent, equal to the amount that would be payable as additional pension in respect of one hundred percent disability for a child under the Pension Act or the Civilian War Pensions and Allowances Act;
 - (d) the amount of any pension and any award made under subsection (2) of Section 14 and Section 25 of the Pension Act other than an addition to pension for blindness; and
 - (e) fifteen dollars a month while the veteran or qualified person described in that subsection is an in-patient.

The amendment of August 1st, 1955, is set out in Section 32(2) ³ which reads as follows:

- 32(2) No allowance described in Section 31 may be paid to a person described in that section who is an in-patient in a hospital if a pension under the Pension Act is being paid at a rate equal to or in excess of the rate of allowance specified in subsection (2) of that section.

General

The effect of the amendment of August 1, 1955, in regard to pension paid at current rates, is that pensioners in receipt of 100% and 95% pension receive, at single rates, \$230 and \$218.50 respectively. The rate of treatment allowance, after the deduction of \$15 required by Section 31(2)(e) of the Treatment Regulations, is \$215 monthly. Therefore, the 100% and 95% pensioners are not affected by the \$15 monthly deduction as, while in hospital, they continue to receive pension at full rate. Those in receipt of pension at less than 95% are affected by this deduction, in that, in lieu of pension, they receive the net treatment allowance of \$215 monthly, rather than 100% pension, while in hospital.

REPRESENTATIONS AND EVIDENCE

The War Amputations of Canada: This Association suggested that pensioners, while undergoing hospitalization for their pensionable disability, should be entitled to the equivalent of 100% pension. The prepared brief read: ⁴

The Pension Act provides, per Section 33(1) and (2) that a 100% pension may be reduced by an amount that will make such pension equal to the treatment allowance when a pensioner is under treatment in a departmental institution.

A 100% pensioner continues to receive full pension. However, pension for a 50% pensioner does NOT increase to 100% when under treatment in hospital for his pensionable disability, and he receives only the DVA Treatment Allowance rate which is \$15.00 less than 100% pension.

This Association considers that all pensioners should be entitled to the 100% rate when in hospital. The following reasons are given:

- (1) When in hospital the pensioner is incapable of earning additional income.
- (2) When in hospital the responsibility for support and maintenance of dependents continues as if he were not a hospital patient.

In explanation of the recommendation, Mr. S.J. Alderdice, an executive officer of the Association, stated: ⁵

In other word, the man who has a 50% pension is brought to the 100% rate for hospital allowance less the \$15 deduction, and we feel that this is a discrimination for one thing, and an annoyance for another.

The following discussion took place concerning this item: ⁶

Mr. Justice Woods: Now, do you really think this is valid; that the costs of operation at home are not less because he is there?

Mr. Alderdice: I think not. I don't really know why they set this \$15 rate. It happened many, many years ago and perhaps it was put into effect as a deterrent. I am not quite sure; no one seems to know the answer how this thing originated, but should a man go into hospital he would be deducted 50 cents a day, or \$15 a month, for 30 days, but whatever the reason was at that time it is -----

Representations and Evidence

Mr. Justice Woods: Well, some other groups represented actually if a man went into hospital the costs at home in many instances increased. I think examples were given to us of a veteran who was able to do things at home, to do the lawn, and this sort of thing. He was gone to hospital and a lot of other things such as this had to be done.

I am trying to decide in my mind what you are trying to do here. What is trying to be done with this \$15? The first thought occurs, a man goes into hospital; he is getting room and board; he is being taken care of, and it costs his family less to live.

Well, we have had countering suggestions to this from various other groups.

Mr. Alderdice: This seems to be the popular idea or conception of this thing, but certainly we know that \$15 a month is not going to support a man in hospital, nor would it support him at home.

As you have pointed out, there should be additional costs involved when he is in hospital, and this is possible.

In other words, his wife might be visiting him by taxi, and this sort of thing, and there might be many other things.

Mr. Justice Woods: If it had any usefulness or argument, it outlived it?

Mr. Alderdice: Yes, the reasons are obscure now.

HISTORY

The provision for reduction of pension during treatment was first set out in an amendment to the Pension Act in 1923, as follows:⁷

1923

30. When a pensioner commences treatment under the jurisdiction of the Department of Soldiers' Civil Re-establishment, and his pension, including the pension, if any, for his dependents, is greater than the pay and allowances issued by that Department, there shall be deducted from such pension towards the cost of maintenance in hospital an amount equal to the difference between such pension and such pay and allowances.

The rate for 100% pensioner at that time was \$600, plus a "cost-of-living" bonus of \$300, making a total of \$900 per annum, or \$75 per month. The treatment allowance under the Department of Soldiers' Civil Re-establishment was \$45 per month. Hence, the amount deducted in accordance with Section 30 was \$30 monthly.⁸

It is noted that the reason given for this deduction, as set out in Section 30 quoted above, was as a contribution "towards the cost of maintenance in hospital".

This matter was studied by the Royal Commission on Pensions and Re-establishment of 1922-24. At that time, when a pensioner was admitted to hospital for treatment, his pension ceased and he was placed on treatment allowances. In the memorandum from the Board of Pension Commissioners the following recommendation was made:⁹

1924

(1) The system of pay and allowances should be abolished and one hundred percent pension in lieu thereof substituted therefor.

One hundred percent pension in the case of privates is slightly more; in the case of Officers and Non-Commissioned Officers with no family or small families slightly less; with large families practically the same as pay and allowances.

It would be necessary to amend the Pension Act otherwise the benefits of Section 33 would accrue to those receiving one hundred percent pension in respect of treatment.

History

(2) The Board of Pension Commissioners should control the payment of all pensions and all correspondence to pensioners with regard to their pensions.

(3) A daily list of pensioners admitted to treatment (with pay and allowances) could be forwarded from all Soldiers' Hospitals to the Head Office of the Board of Pension Commissioners and these be automatically placed on one hundred percent pension to date from the date of admission to hospital.

(4) Soldiers' Hospitals before discharging any patient should send him with his Hospital Treatment Case Sheet to the District Pensions Medical Examiner for complete examination and recommendation as to his future award of pension.

(5) The pensioner following his discharge from hospital should be carried on one hundred percent pension for a certain number of days after discharge (approximately five to ten) in order that he may be provided with an extra amount of funds pending his resuming his former occupation. At the expiration of that time he automatically reverts to the amount of pension recommended by the District Pensions Medical Examiner.

This would dispense with all pay and allowances and the large accounting and paying staffs in each Unit, and all cheques would be issued monthly from Pay Branch of the Head Office of the Board of Pension Commissioners as is done in the case of all other pensioners. A saving of hundreds of thousands of dollars in administrative expenses would result from this procedure.

(6) The only funds paid to ex-soldiers by the Treatment Branch would be their expenses at a fixed rate for board and lodging in travelling to and from treatment. Travelling warrants would also be issued.

(7) The man on discharge from hospital would be paid at a fixed rate any expenses incurred in travelling to and from treatment and he would receive a cheque for one hundred percent pension at the end of the month covering a period of treatment and for some days following discharge. The pension for the extra days following discharge from hospital would more than compensate him for any loss of immediate pay at the time he is discharged. It has been shown that a small percentage of pensioners remain in hospital less than three weeks and they and their dependents would be money in pocket by accepting the one hundred percent pension during treatment together with the one hundred percent pension for a certain number of days (to be decided on) following pensioner's discharge from hospital.

History

(8) Out patient, Class One (with pay and allowances) should be discontinued. The number of such cases is negligible.

These suggestions are offered to the end that:-

- (1) A large saving in administrative expenses would be made;
- (2) The adjustment of claims for pension and treatment would be accelerated;
- (3) The arrangements for pension outlined above would afford a financial bridge in treatment cases between discharge from hospital and the resumption of former occupation.

The Royal Commission made the following recommendation in regard to this matter:¹⁰

The amounts payable to a patient during treatment are more logically based on 100% pension than on service pay and allowance.

Despite the recommendation of the Royal Commission, the pensioner in hospital continued to receive treatment allowances rather than pension until 1955. From 1924 until 1944 the difference in the two allowances varied from \$14 to \$30 a month, depending upon the patient's rank and marital status. In 1944 the amount was arbitrarily made uniform at \$15 a month for all patients.¹¹

This provision in the Pension Act was re-written in 1928 to read as follows:

29(1) During such time as, under the departmental regulations in that behalf, a pensioner is in receipt of pay and allowances from the Department while under treatment, payment of his pension shall be suspended and the pay and allowances shall stand in lieu thereof; pending a fresh award, payment of the pension shall recommence forthwith after the termination of such suspension.

1928

(2) During such time as, under the departmental regulations in that behalf, a pensioner is an in-patient under treatment in respect of a disability other than his pensionable disability, his pension, if in excess of the amount he would have been entitled to receive by way of pay and allowances, if the disability for which he is under treatment had been pensionable, shall be reduced to such amount; pending a fresh award, the payment of pension in full shall recommence forthwith upon the pensioner's ceasing to be an in-patient as aforesaid.

History

The explanatory note in Bill 289, in regard to the above amendment, stated: ¹³

Under the proposed change, payment of pension will be suspended while a pensioner is undergoing treatment with pay and allowances. This will make no difference to the pensioner but will result in an administrative saving. The amendment is intended to define exactly the necessary procedure also in cases of treatment only without pay and allowances.

A minor amendment was made to this Section in 1933 to conform with accounting practices. There was no change in intent. 1933

This provision was rewritten in 1954. Again there was no change in intent and, except for minor changes in wording, the provision today reads the same as when it was first inserted into the legislation in 1923. 1954

This provision of the Pension Act became inoperative in 1955, by an amendment in the Veterans Treatment Regulations which read as follows: ¹⁴ 1955

No allowance described in section 31 may be paid to a person described in that section who is an in-patient in a hospital if a pension under the Pension Act is being paid at a rate equal to or in excess of the rate of allowance specified in subsection (2) of that section.

COMMITTEE RECOMMENDATIONS

(144) That subsections 1 and 2 of Section 33 of the Pension Act, which provides for a reduction of pension while a pensioner is in receipt of a Treatment Allowance from the Department of Veterans Affairs, be deleted so that this provision in the Pension Act will conform to the Veterans Treatment Regulations which state that pension, if in payment at a rate equal to or exceeding the treatment allowance, will remain in payment in lieu of treatment allowance when the pensioner is undergoing treatment for his pensionable disability.

Provision
For
Reduction
in Pension
While Under
Treatment
Be Deleted
(Redundant)

(145) That a pensioner undergoing treatment for his pensionable condition receive 100% pension, without deduction, during such period of treatment.

Pension Be
Increased
to 100%
While Under
Treatment
For
Pensionable
Disability

COMMENT

Your Committee recommends deletion of subsections (1) and (2) of Section 33 as these are no longer operative - and have not been so since August 1, 1955. Your Committee notes that strong representations had been made by veterans organizations to have the \$15.00 monthly deduction removed. It is assumed that these representations bore fruit in 1955, at least in so far as this deduction affected those whose pensions were in payment at a higher rate than the net treatment allowance.

Your Committee was unable to determine any reason for the Government's decision at that time to amend the Treatment Regulations by permitting the pension to remain in payment rather than pay the lower treatment allowance. The effect was the same, but it did mean that sub-sections (1) and (2) of Section 33 remained in the Act, to no purpose. It seems evident now that they should be removed.

Your Committee's second recommendation is to the effect that all pensioners, while undergoing hospital treatment for a pensionable condition, should be entitled to 100% pension without deduction. In reality, this extends the principle of the August 1, 1955, amendment to the Treatment Regulations, so that it would be applicable to all pensioners.

So far as your Committee is concerned, the important factor in these situations is the assessment of the disability. It is understood that the basic rate of pension is based on the loss of earning capacity in the unskilled labour market. Where a pensioner, (even one in receipt of the lowest rate) is in hospital to receive treatment for his pensionable disability, the extent of his disqualification in the unskilled labour market, by reason of that disability, is 100%. In other words, he cannot engage in gainful employment while undergoing hospitalization.

Comment

The wording of the provision when it was placed in the Act in 1923, indicates that the deduction while in hospital was intended as a partial contribution by the patient towards the cost of his hospitalization. Presumably the theory was that, while in hospital, his expenses would be less than at home, and part of the money which he might normally contribute towards board and room should legitimately be directed to the payment of part of his hospitalization.

Your Committee considers this theory to be untenable, if it is accepted that pension is paid, in part, in compensation for the loss of earnings, in part as a mark of gratitude for service rendered and thirdly in payment of a debt owed to the ex-member under an implied contract. That is to say, the pension is not paid merely as subsistence and hence should not decrease just because the pensioner, while in hospital, receives his subsistence through the hospital facilities.

Moreover, any merit which this theory may have had formerly would seem to have been completely dispelled by the introduction in 1955 of the amendment to Treatment Regulations. This amendment meant that no deduction would be asked of those in receipt of pensions in excess of the amount payable under the Treatment Regulations.

It is not consistent that those in receipt of pension which exceeds the amount of treatment allowance should be exempt from this contribution, while those whose pensions are less than the treatment allowance should be required to make it. It may be argued that this is not the case, in that, for example, a 50% pensioner, at single rates, is paid \$115.00 a month pension, which is increased to \$215.00 a month as a "treatment allowance" when he is in hospital. As explained earlier in this comment,

1195

Comment

your Committee's view is that a pensioner undergoing treatment in hospital for his pensionable condition is entitled to pension at the 100% rate. He is totally incapacitated, at least temporarily, by his pensioned condition. Thus, he is entitled to the 100% rate and should not be subject to a \$15.00 monthly deduction, as now required by the Treatment Regulations.

Your Committee cannot escape the conclusion that the amendment to the Treatment Regulations of 1955, which in effect exempted from deduction those in receipt of pension at a higher amount than the Treatment Allowance, was a half way measure, possibly introduced as an expedient.

The Royal Canadian Legion approved the following Resolution at its 1952 Dominion Convention: 15

Whereas 100% pensioner when hospitalized for his war disability receives no additional remuneration but must pay \$15.00 per month for his hospitalization, thus decreasing his earning power; and

Whereas the 25% pensioner when hospitalized under similar circumstances is automatically brought to the 100% pension status while in hospital (less \$15.00 per month hospitalization payment); and

Whereas most 100% pensioners do not have any other means of income due to greater disability and their dependents are thus deprived of a certain amount of their income thus making the above system an unfortunate discrimination against needy families:

Therefore be it Resolved that this convention request the Dominion Command to urge the Federal Government to waive this \$15.00 charge to pensioners when hospitalized for their war disability so that free hospitalization be granted to all pensioners under these circumstances.

In reply to this Resolution forwarded to the Legion by Deputy Minister of Veterans Affairs under date of October 6, 1952, the following statement was made: 16

Comment

This subject has been considered from time to time since it was brought forward by resolution from the 1948 Convention, and, indeed, previously thereto, but it is not considered that evidence had been produced of hardship or injustice resulting from the present level of hospital allowance, which is 100% pension less \$15.00 per month - the deduction representing the cost of food, which the 100% pensioner not in hospital has to pay for from his pension.

Your Committee notes that, despite the comment of the Deputy Minister that no evidence was produced to indicate that the \$15 monthly deduction represented either hardship or injustice, the Government took action to remove the deduction for those in receipt of pension at a rate which exceeded the approved rate for treatment allowance. The principle seems the same, regardless of the percentage of pension in payment. Accordingly, the amendment to the Treatment Regulations of August 1st, 1955, would appear, in the view of your Committee, to have been an expedient, designed to avoid reducing the actual amount of money being received by the pensioners in the higher pension classes.

However, having removed the deduction for the higher classes of pensioners, the Government has presumably abandoned the premise that a deduction should be made for maintenance while in hospital --- at least for the 100% and 95% pensioners. It seems obvious that this premise should now be made applicable to all pensioners on the same basis.

Your Committee's view that a pensioner, undergoing treatment for his pensioned condition, is entitled to 100% pension was supported in a report prepared by the Department of Veterans Affairs Treatment Branch under date of December 2, 1958. The pertinent sections of this report which deal with 100% pension while in hospital, follow: ¹⁷

Comment

In considering ~~the~~ basis of treatment allowance payments, it is pointed out that

- (1) disability pension is payable as of right because it has been conceded by the Commission that the disability was incurred or aggravated during service; therefore, treatment allowances should be considered in the same category while a pensioner is receiving treatment for that disability and is 100% disabled;
- (2) when a pensioner is entitled to sick leave with pay as part of the terms of his employment and uses this sick leave for the period he is treated for his pensioned disability, this should have no effect on the payment of treatment allowance nor should his financial worth otherwise be a factor; and
- (3) to pay allowances only when a pensioner suffers a loss of income during the time of treatment would result in many administrative complications.

Conclusion It is considered that there should be no change in the present Departmental practice.

In regard to the \$15.00 monthly deduction during in-patient treatment the report stated: ¹⁸

Considerations

The maximum treatment allowance payable during in-patient treatment is 100% disability pension less \$15.00 a month. The maximum allowance during out-patient treatment is 100% disability pension with no deduction. In all cases the pension payment remains unaltered during treatment..

The history of this discrepancy is set forth in Item 1 of this Part of the brief and as mentioned previously the \$15.00 has been considered as a deduction in respect of maintenance. Recalling the basis on which treatment allowances are paid, i.e., on the same basis as disability pension, the question of whether there should be a difference between in-patient and out-patient treatment allowance rates has been considered on several occasions.

It has been confirmed that the allowances payable to United Kingdom and United States veterans during the treatment of their service disabilities are the same whether they are undergoing out-patient or in-patient treatment. Serving members of the forces and of the R.C.M.P. have no deductions made in their pay when they are in-patients. Workmen's Compensation Board cases receive total permanent or temporary disability compensation while they are in-patients.

Comment

Effective August 1, 1955, subsection (3) was added to Section 31 VTR; this subsection reads as follows: "No allowance may be awarded while the person is an in-patient if the pension is being paid at a rate equal to or in excess of the maximum rate of allowance specified in subsection (2)." This had the effect of nullifying Section 33(1) of the Pension Act which states in effect that, during Section 5 VTR treatment, pension shall not exceed the maximum treatment allowance rate which, for in-patients, is \$15 a month less than the 100% pension rate. As a consequence pension is now never reduced when a pensioner is receiving treatment from the Department.

Previous Recommendations

In 1950, 1951 and again in May of this year the Department's Advisory Council, after careful study, agreed that the deduction of \$15 with respect to in-patient treatment allowance was not in keeping with the accepted principle that a pensioner under treatment for a service disability should be in receipt of an amount equivalent to 100% pension on the premise that he was 100% disabled during such periods of treatment. However, no action was initiated to implement such a change primarily because of the financial implications.

Conclusion

There appears to be no sound reason why there should be a difference in the rate depending on whether in-patient or out-patient treatment is involved or of making any deduction in maintenance during in-patient treatment if the principle that the pensioner is 100% disabled while in receipt of treatment for his service disability is accepted. Actually since the amendment to Section 31 VTR effective August 1, 1955, there has been no deduction in the payments of disability pension when the pensioner was admitted to hospital and when the pension in payment exceeds the treatment allowance rate; consequently in those cases no deduction is being made at the present time.

If the \$15 deduction were cancelled it is difficult to accurately estimate the additional annual cost but based on a survey the cost will not exceed \$25,000. It is recommended that the Veterans Treatment Regulations be amended so that the \$15 deduction be eliminated.

PENSION REDUCED WHILE HOSPITALIZEDREFERENCES

1. Pension Act, Section 33 (1)(2), RSC 1952, C.207.
2. Regulations made by Order-in-Council, PC 1962 - 1401, dated October 4th, 1962.
3. Veterans Treatment Regulations.
4. Proceedings of Committee Sessions, Volume II, Page K-27.
5. Ibid, Volume II, Page K-28.
6. Ibid, Volume II, Page K-28.
7. SC 1923, C.62, s.8 assented to June 30th, 1923.
8. Report, Royal Commission on Pensions and Re-establishment, 1922-24, Sessional Paper 203-D, Page 64.
9. Ibid, Pages 108 and 109.
10. Ibid, Page 113.
11. Order-in-Council, PC 4465, dated June 13th, 1944.
12. SC 1928, C.38, s.20 assented to June 11th, 1928.
13. Bill 289, as passed by the House of Commons, May 18th, 1928, Page 9.
14. Veterans Treatment Regulations, Section 32 (2).
15. Department of Veterans Affairs Subject File on Veterans Associations, Royal Canadian Legion.
16. Ibid.
17. Department of Veterans Affairs Treatment Services File, Memorandum dated December 2, 1958, Page 2.
18. Ibid, Pages 5 and 6.

CHAPTER 41PENSION RE-INSTATEMENT - REMARRIED WIDOWGENERAL

Section 45(2) of the Pension Act makes provision that a woman^{*} whose pension was discontinued on re-marriage may have that pension revived if, within a period of five years after her re-marriage, her second husband dies and she is left in a financially-dependant condition. This section reads as follows:

45(2) If through the death of the husband of a woman married or remarried, within a period of five years after such marriage or remarriage, the woman is left in a dependent condition, pension at the rate provided in Schedule B for a widow or at such lesser rate as the Commission in its discretion awards shall be restored as from the date of death of such husband, but there shall be deducted from such pension the amount of any final payment made under subsection (1) at a rate not exceeding fifty percent of the rate of the restored pension being paid from time to time, and the restored pension shall be discontinued should she cease to be in a dependent condition or remarry.

This Section should be read in conjunction with Section 45(1) which provides that the pension paid as the result of her marriage to a member of the forces shall cease, if she remarries. This Section is as follows:

45(1) Upon the marriage or remarriage of the mother, widow, or divorced wife of a deceased member of the forces who is receiving a pension, or of a woman awarded a pension under subsection (4) of section 36, her pension shall cease, and she is then entitled to be paid one year's pension as a final payment.

* Reference to "woman" in this Chapter shall include a mother, widow or divorced wife of a deceased member of the forces.

REPRESENTATIONS AND EVIDENCE

Your Committee noted that resolutions had been submitted to the Government by veterans organizations concerning an amendment to the Act, to provide for restoration of pension should the widow no longer be supported by the husband of her second marriage. Your Committee has selected two of these resolutions as follows: ¹

WHEREAS Section 45 of the Pension Act states:

- "(1) Upon the marriage or remarriage of the mother, widow or divorced wife of a deceased member of the forces who is receiving a pension or of a woman awarded a pension under subsection (4) of Section 36, her pension shall cease, and she is then entitled to be paid one year's pension as a final payment. R.S. c157, S.40.
- (2) If through the death of the husband of a woman, married or re-married, the woman is left in a dependent condition, pension at the rate provided in Schedule B, for a widow or at such lesser rate as the Commission in its discretion awards shall be restored as from the date of death of such husband, but there shall be deducted from such pension the amount of any final payments made under subsection (1) at a rate not exceeding fifty percent of the rate of the restored pension being paid from time to time, and the restored pension shall be discontinued should she cease to be in a dependent condition or re-marry". and

WHEREAS a pensioned mother, widow or divorced wife loses her pension upon remarriage and if this marriage is subsequently dissolved by divorce:

THEREFORE BE IT RESOLVED that Section 45 of the Pension Act be amended to restore pension where such marriage was dissolved within five years and the woman is left in a dependent condition, provided the Pension Commission is satisfied that the said woman was the innocent party.

Representations and EvidenceREINSTATEMENT TO REMARRIED WIDOW ²

WHEREAS the Dominion Government recognizes by law widows whose husbands were killed or died of war disabilities caused or contributed to by service;

AND WHEREAS said widows were encouraged by Government subsidy to remarry and many remarried ex-servicemen;

AND WHEREAS numerous deaths not related to service have occurred among the second husbands after five years from the date of marriage, thus causing extreme hardship to the widow due to her inability to apply for reinstatement of pension due to the five-year clause of the Pension Act.

THEREFORE BE IT RESOLVED that Section 45, paragraph 2, of the Pension Act be amended permitting a widow to be reinstated to full pension at any time following the death of her second husband, should she be in a dependent condition.

HISTORY

The first provision for the discontinuation of pension paid to a woman who has remarried was set out in the original Pension Act of 1919, as follows: ³

1919

41. Upon the marriage or re-marriage of the mother, widow or divorced wife of a deceased member of the forces who is receiving a pension, or of a woman awarded a pension under subsection three of section thirty-three of this Act, her pension shall cease, and she shall then be entitled to be paid one year's pension as a final payment.

This matter was the subject of discussion before the Royal Commission on Pensions and Re-establishment of 1922-24, which resulted in a recommendation by the Commission to the effect that pension should be restored for a woman whose pension had been cancelled on re-marriage if her second husband had died within five years, and if the woman was in a dependent condition.

1923-24

The relevant excerpts from the Report of the Royal Commission on Pensions and Re-establishment follow: ⁴

Allowance to widowed mothers and widows on re-marriage

Section 41 - Upon the marriage or re-marriage of the mother, widow, or divorced wife of a deceased member of the forces who is receiving a pension, or of a woman awarded a pension under sub-section three of section thirty-three of this Act, her pension shall cease, and she shall then be entitled to be paid one year's pension as a final payment.

Suggestion by Ex-Service Men

That if the widow who has re-married is deserted or again becomes a widow within five years after the re-marriage she should be restored to pension.
(Toronto 666, 679, 1136; Regina 15).

Under Section 41, one year's pension is paid as a bonus to a woman who has been receiving pension as the mother, widow, etc., of the ex-soldier. Cases have arisen - not so infrequently as might have been supposed - where it turns out that the re-marriage has been induced to some

History

extent by the attraction of the one year's bonus and later the woman has been deserted. There are also cases, much more deserving, where the second husband has died within a short time after re-marriage. In either case the woman's right to pension has been terminated by the bonus payment. The Pensions Board have authority to, and, in certain cases where the step-father was unable to earn a livelihood, did increase the children's pension to orphan rates (Toronto 669). The right of the children to pension is not affected by the re-marriage.

The reasoning is that the woman has, by her re-marriage, ceased to be the dependent of the soldier, and that consequently the obligation of the State to her, as such dependent, has terminated. The opposing consideration is that the undertaking of the State with the soldier was to make up reasonably to his dependents the pecuniary assistance he would have supplied had he lived. The State also makes the liberal presumption that had the soldier not lost his life on service he would have supplied this assistance to the dependents during their lifetime.

There are, the Commission is convinced, cases of genuine hardship to soldiers' female dependents who have re-married and thus lost their pension, and whose husbands have died in a comparatively short time, leaving them with no means of support. It is strongly urged that the fact that they have tried unsuccessfully to restore themselves to normal life by re-marrying does not discharge the State from its revived responsibility.

In Great Britain there is a different practice as between officers and other ranks. In the case of the female dependent of an officer no bonus is paid on her re-marriage, but if she becomes a widow, pension is revived. In the case of other ranks, one year's pension is paid as a gratuity on re-marriage, but on the death of the second husband pension is not re-stored.

The attention of the Commission has been called to the Act respecting the Royal Canadian Mounted Police (R.S.C. 1906, C.91, S.56(2)). This provides that on the re-marriage of a widow the pension is simply suspended, and on the death of the second husband it is restored, but under this Act no bonus is paid on the re-marriage.

The Commission considers that there is sound reason for an extension of the present provision of the Pensions Act. As the Act stands the prudent woman is faced with a serious question when an opportunity for re-marriage presents itself. If she marries she gets a home and a cash bonus, but she forfeits forever an assured maintenance for the rest of her life. The Commission considers that it is in the interest

History

of the Country as well as of the dependent woman that her misgivings be removed and the re-marriage encouraged by some financial assurance for the future. The advantage from the general social standpoint is clear and, in addition the children of the soldier, who are to a certain extent wards of the State, have the benefit of paternal care. The financial liability involved is not absolute, but purely contingent on the death of the husband within five years. Against this can be placed the probability of a greater number of marriages, and the consequent probable relief of the State from subsequent pension payments. There would also be a reduction in the amount paid for children's pensions which, if the mother remained a widow, might have to be increased to orphan rates. All the foregoing applies to cases where the re-marriage is terminated by the husband's death.

But it is further urged that provision be made for cases of desertion by the second husband. The Commission considers that while there are cases of hardship under these circumstances, it would only open the door to fraud to make any such general provision. The woman who re-marries should take some responsibility, and the fact that in case of desertion pension will not be revived may have a good influence in preventing hasty and ill-considered marriages. If the claim for provision on desertion were admitted it would follow that there would be an even stronger claim in case the second husband was prevented by illness from supporting his wife. For the State to provide for these cases would, in effect, completely disregard the new marriage relation, and in the result, benefit a man who has no claim, viz., the second husband, both by making him careless of his responsibility for the maintenance of his family and by providing indirectly some part of his own support.

The Commission does not consider that, on the death of the second husband, the woman should be entitled as of right to be reinstated to pension. The husband may have left her a substantial estate. The provision should only cover cases of need and be for so long as such need continues. The limitation in the suggestion to cases of death within five years of the re-marriage is, it is assumed, based on the idea that, if the second husband has lived for that period, it can be presumed that he has made some provision for his wife. This ensures that the necessity for the husband and wife providing for the future is not done away with by undue reliance on the bounty of the State. It also adds the qualification of thrift to those which the woman may reasonably require of the man before accepting him.

HistoryRecommendation of Commission re Section 41

That provision be made that in case of the death of the husband of a woman married or re-married, as contemplated by Section 41, and if such death takes place within five years after such marriage or re-marriage, pension be restored if and so long as the widow is in a dependant condition, and the final payment previously made under Section 41 be refunded in instalments as fixed by the Pensions Board, such instalments not to exceed 50 per cent of the amount of the restored pension being paid from time to time.

The 1924 Parliamentary Committee on Pensions, Insurance and Re-establishment dealt with this question. Major General W.A. Griesbach, a member of the Senate, made the following recommendation:⁵

1924

The first point which I would like to bring to your notice is the desirability of making provision for the re-establishment of the widow's pension in the case of the widow who marries a second time. That is to say, she is entitled to a pension with respect to her deceased husband; she is in the enjoyment of that pension and she marries again. Under the law as it now stands she receives a form of gratuity of one year's pension, and then she goes off pension. With that I do not disagree at all. She has now made provision for herself by taking a second husband, but should that second husband die the law as it now stands leaves her without any pension at all.

This Parliamentary Committee, after consideration of the recommendation of the Royal Commission, made the following proposal in its report to the House of Commons:⁶

If through the death of the husband of a woman married or re-married within a period of five years after such marriage or re-marriage, the said woman is left in a dependant condition the pension previously awarded to her or such lesser pension as the Commission may at its discretion decide to award, shall be restored as from the date of the death of the said husband provided that there shall be deducted from such pension the amount of final payment previously made at a rate not exceeding 50 per cent of the amount of the restored pension being paid from time to time provided also that the restored pension shall be discontinued should the said woman cease to be in a dependant condition or remarry.

History

The Pension Act was amended under date of July 19th, 1924, in accordance with the recommendation of the Parliamentary Committee as follows: ⁷

If through the death of the husband of a woman, married or re-married, within a period of five years after such marriage or re-marriage, the said woman is left in a dependent condition, the pension previously awarded to her or such lesser pension as the Commission may at its discretion decide to award, shall be restored as from the date of the death of the said husband; provided that there shall be deducted from such pension the amount of final payment previously made at a rate not exceeding fifty percent of the amount of the restored pension being paid from time to time; provided also that the restored pension shall be discontinued should the said woman cease to be in a dependent condition or remarry.

In the Revised Statutes of 1927 the former Section 41 was changed to Section 40 and amended to read as follows: ⁸

1927

40.1. Upon the marriage or re-marriage of the mother, widow or divorced wife of a deceased member of the forces who is receiving a pension or of a woman awarded a pension under subsection three of section thirty-two of this Act, her pension shall cease, and she shall then be entitled to be paid one year's pension as a final payment.

2. If through the death of the husband of a woman, married or remarried, within a period of five years after such marriage or re-marriage, the said woman is left in a dependent condition, the pension previously awarded to her or such lesser pension as the Commission may at its discretion decide to award, shall be restored as from the date of the death of the said husband; Provided that there shall be deducted from such pension the amount of final payment previously made at a rate not exceeding fifty percent of the amount of the restored pension being paid from time to time, and that the restored pension shall be discontinued should the said woman cease to be in a dependent condition or remarry.

History

In the Revision of Statutes of 1952 the number of this Section was changed from 40 to 45 and read as follows: ⁹

1952

45(1) Upon the marriage or re-marriage of the mother, widow, or divorced wife of a deceased member of the Forces who is receiving a pension, or of a woman awarded a pension under subsection (4) of Section 36, her pension shall cease, and she is then entitled to be paid one year's pension as a final payment.

(2) If through the death of the husband of a woman, married or re-married, within a period of five years after such marriage or remarriage, the said woman is left in a dependant condition, the pension previously awarded to her or such lesser pension as the Commission may at its discretion decide to award, shall be restored as from the date of the death of the said husband; but there shall be deducted from such pension the amount of final payment previously made at a rate not exceeding fifty percent of the amount of the restored pension being paid from time to time, and the restored pension shall be discontinued should the said woman cease to be in a dependent condition or remarry. R.S., c.157, s. 40.

Your Committee notes that there has been no basic change in the intent of this provision of the Act since its inception in 1924.

COMMITTEE RECOMMENDATIONS

- (146) That the Pension Act be amended to provide that, where a pension has been discontinued in accordance with Section 45(1) of the Act ~~due~~ to the marriage or re-marriage of a woman in receipt of pension, and that woman falls into a financially-dependent condition through the death or desertion of her husband, or if the marriage is dissolved or annulled and the woman is not the respondent, pension may be restored at the discretion of the Commission.

Pension to be
Re-instated if
Second Husband
Dies or Deserts
or if Marriage
is Dissolved
or Annulled

COMMENT

Your Committee considers that the existing provision, under which pension may be restored to a woman whose pension has been cancelled on re-marriage, provided that her second husband dies within five years, is too restrictive.

Perhaps the strongest argument for providing some latitude in cases of this nature is to pose the question of what consideration could be given, should the second husband die within five years and one day after her second marriage. The answer, in accordance with Section 45(2) of the Act, is "none". Your Committee cannot see the validity of a time limit in a case of this nature, and feels that the Commission should be free to exercise its judgement as to whether a pension should be restored where the second husband dies.

Your Committee considers that there should be some relaxation of this provision, also, in the event that the second husband deserts the woman; or if it becomes necessary to terminate the marriage through divorce or annulment and the woman is not at fault.

Under the existing Act, the only circumstance which prevails is where the second husband dies. As your Committee sees it, there is little difference in principle in the case where the woman's support ceases by reason of death and where the support ceases by reason of desertion, divorce or annulment.

Your Committee noted that, in its comments on this question, the Royal Commission on Pensions and Re-establishment of 1932-42, considered two opposing considerations. The first was that the woman, by re-marriage, ceased to be the dependant of the ex-serviceman and consequently

Comment

the obligation of the State to her, as his dependant, was terminated. The opposing view was that the undertaking of the state with the ex-serviceman was to provide the financial assistance which he himself would have supplied, had he lived. The Royal Commission suggested, in regard to these alternatives as follows:*

It is strongly urged that the fact that they (re-married widows) have tried unsuccessfully to restore themselves to normal life by remarrying does not discharge the state from its revived responsibility.

At the time of this Royal Commission study, the Pension Act made no provision whatsoever for reinstatement of pension should a woman re-marry and subsequently the second marriage was terminated. The Royal Commission suggested that, as the Act stood at that time, a prudent woman was faced with a serious question when an opportunity for re-marriage presented itself. In this respect the Royal Commission report suggested:**

If she marries she gets a home and a cash bonus but she forfeits forever an assured maintenance for the rest of her life. The Commission considers that it is in the interest of the country as well as the dependent woman that her misgivings be removed and the re-marriage encouraged by some financial assistance for the future.

Your Committee considers that this principle is valid, not only in regard to the recommendation of the 1922-24 Royal Commission that pension be restored if the husband died within five years, but also if her support ceased by reason of desertion, divorce or annulment.

It is understandable that the consideration for including provision in the event of termination by reasons other than death were

* See page 1204 hereof.

Comment

not as pertinent in 1924 as they are today. The rate of desertions, divorces and annulments has increased over the years; hence, the apprehensions which the 1924 Royal Commission saw as being a problem to a pensioned woman considering re-marriage are greater today than they were then.

Compassionate Pension Not Applicable

Your Committee examined into the question of whether a compassionate award of pension could be made under Section 25, where it was desired to restore a pension which had been suspended on re-marriage, but where the second husband was not providing support because of desertion or other reason. A specific case was reviewed in which the Commission had considered a request to make an award under Section 25 in a case where the widow of a member of the Forces had forfeited her pension on re-marriage, but where the second marriage had terminated in separation after three months. In this respect, Mr. J.M. Forman, Deputy Chairman of the Commission wrote under date of December 30th, 1966 as follows:¹⁰

While I may not commit the Commission on an individual case, I think it would be fair to say I can find no precedent for a Section 25 award on behalf of a re-married widow who has become separated from her new spouse. As you are well aware, had the second husband died within five years of her re-marriage, she would have been eligible for reinstatement of widow's pension, under certain conditions, but of course, she does not have this benefit in the event of a separation.

Your Committee received a representation from a widow who had been married previously to a veteran in receipt of pension of 100% for amputation of both legs, attributable to service in World War I. The veteran died on April 9th, 1938 and she continued to receive widow's

Comment

pension until the re-marriage on August 10th, 1953, at which time her widow's pension was cancelled. Her second husband died on August 14th, 1958 - five years and four days after their marriage. The widow applied to the Canadian Pension Commission for restoration of her pension but this could not be done under the Act, as Section 45(2) provides that the death of the second husband must occur within five years of the date of the re-marriage.

The Royal Canadian Legion and a number of Members of Parliament submitted the matter to the Commission for further consideration, and consideration was given to a compassionate award under Section 25 of the Pension Act. The Commission stated, in a negative decision under date of December 30th, 1958, as follows: ¹¹

When this widow contracted her marriage of August 10th, 1953 she ceased to have any standing before the Commission as the widow of the pensioner.

Restoration of her standing before the Commission was contingent upon the termination of her marriage of August 10, 1953 by the death of her husband within a period of five years after the marriage. As her husband survived for more than five years after the marriage she cannot now have any standing before the Commission. The Commission is therefore precluded from considering her application under Section 25 of the Pension Act.

Information on the Pension Commission file appears to indicate that the widow's second husband was killed in an accident while engaged in farm work. He apparently left no estate and correspondence between this widow and your Committee would indicate that the widow had been able to maintain herself through employment up until 1966, but is now unable to work and is presumably without funds.

Comment

In summary then, your Committee considers that the provision of Section 45(2), under which a pension may be restored to a woman, is an essential feature of the Pension Act - but should be extended as follows:

- (1) The time limit of five years should be removed; and
- (2) The Commission should have discretion to restore pension, not only if the second husband dies as at present, but also if the support from the second husband ceases by reason of desertion, divorce or annulment.

PENSION RE-INSTATEMENT - RE-MARRIED WIDOW

REFERENCE

1. Resolution, Dominion Convention, Royal Canadian Legion, 1956.
2. Ibid, 1961
3. SC 1919, C.43, s.41, Assented to July 7th, 1919.
4. Report, Royal Commission on Pensions and Re-establishment, Sessional Paper 203, Pages 37 to 39.
5. Report, Special Committee on Pensions, Insurance and Re-establishment, 1924, Page 53.
6. Ibid, Page 533
7. SC 1924, C.60, s. 8, Assented to July 19th, 1924
8. RSC 1927, C.157.
9. RSC 1952, C. 207.
10. Committee Case File No. 15.
11. Committee Case File No. 14.

CHAPTER 42MERCHANT SEAMENGENERAL

The Civilian War Pensions and Allowances Act *, Part I, deals with "Canadian Merchant Seamen, Salt Water Fishermen". Section 9 of this part of the Act ¹ provides as follows:

- 9 (1) Subject to subsection (2), no pension shall be awarded under this Part unless an application was made therefor within one year after the occurrence of the disability in respect of which the pension is claimed.
- (2) Where it is established to the satisfaction of the Commission that lack of communication facilities prevented a person from making an application within the time limited by subsection (1), the Commission may, on special application in that behalf, extend the time within which an application for pension may be made.

* Administered by the Canadian Pension Commission
RSC 1952 , C.51

REPRESENTATIONS AND EVIDENCE

Mr. Harold Winch, M.P.: Mr. Winch requested that your Committee examine into the provisions of the Civilian War Pensions and Allowances Act, in regard to the time limit for application for pension by Merchant Seamen and Saltwater Fishermen. In an appearance before your Committee, Mr. Winch stated:

The first is that if a merchant seaman in time of war suffers an injury -- and I may say, sir, there are hundreds if not thousands of them who do not follow it up, but in later years trouble develops; there is a regulation that, if they do not report it within one year of an aggravation of a problem, they are not entitled to any rights, pensions or assistance.

One illustration of that which came to my attention was a Canadian merchant seaman in the last war when, on firing of the gun, the repercussion, he alleges, broke his eardrum. He reported to the captain, got first aid, and, according to my information, as soon as his ship was in port he was taken to a doctor. But, like so many, he did not follow it up, and it was years later when trouble developed -- or an aggravation of the trouble developed. But he did not do anything on it immediately and one year passed. As it got increasingly worse he made application for assistance.

I have taken this matter up and the Minister informs me, and I know this is correct; may I quote what he says, that the Commission considered this application on appearing on January 9th, 1963 but ruled that it was barred under the provisions of Section 9 of Part I of the Civilian War Pensions and Allowances Act. This section reads as follows:

"Subject to subsection (2), no pension shall be awarded under this Part unless an application was made therefor within one year after the occurrence of the disability in respect of which the pension is claimed".

I would ask, sir, your consideration of recommending that that be changed.

I think it is unfair. We are all human. We all hope that there is going to be an improvement. By law regulation we are not supposed to take an assumption that it is going to get better, then if it does get worse but we have not done something within a year, we lose all rights, privileges and pension.

Representations and Evidence

It should be noted that, even if the Commission had been able to consider the application, the circumstances may not have been such as to permit an award of pension. Mr. Winch, in his representations to your Committee, was making the point simply that an application should not be barred by statute.

HISTORY

Under date of November 10, 1939, the Government passed Order-in-Council PC 3359, which extended the benefits of the Pension Act to persons employed in ships of Canadian registry and to Canadian saltwater fishermen in the pursuit of their callings, who suffer disability or death as a result of an enemy war like action or counter action. This Order in Council contained a provision to the effect that application had to be made within one year after the occurrence of the death or disability as follows: ³

1939

No pension shall be payable under these Regulations unless application is made therefor within one year after the occurrence of the death or incurrence of the injury resulting in disability on account of which pension is claimed.

The provisions for pensions for Merchant Seamen and Salt-water Fishermen were incorporated into "an Act respecting Civilian War Pensions and Allowances" assented to August 31st, 1946. This Act contained a restriction to the effect that application had to be made within a one year time limit as follows: ⁴

1946

- 9 (1) Subject to subsection two of this section no pension shall be awarded under this Part unless an application is made therefor within one year after the occurrence of the death or disability in respect of which the pension is claimed.
- (2) Where it is established to the satisfaction of the Commission that
 - (a) lack of communication facilities prevented a person from making an application within the time limited by subsection one of this section; or
 - (b) a dependent of a person in respect of whose death a pension is claimed did not receive notice of the death in time to enable him to make application within the time limited by subsection one of this section, the Commission may, on special application in that behalf, extend the time limit within which an application may be made.

History

This provision in the Civilian War Pensions and Allowances Act was amended in 1948 to read as follows:⁵

1948

9. (1) Subject to subsection two of this section no pension shall be awarded under this Part unless an application is made therefor within one year after the occurrence of the disability in respect of which the pension is claimed.
- (2) Where it is established to the satisfaction of the Commission that lack of communication facilities prevented a person from making an application within the time limited by subsection one of this section, the Commission may, on special application in that behalf, extend the time within which an application for pension may be made.

The purpose of this amendment was given in an Explanatory Note in Bill 393 of the House of Commons as set out below:⁶

The purpose of the present Bill is to remove the time limits in which an application for pension in respect of death may be made under Parts I and X of The Civilian War Pensions and Allowances Act.

1. The effect of this amendment is to remove that time limit in so far as it affects such applications in respect of Canadian Merchant Seamen and Salt-Water Fishermen. Section seven of the Act permits awards of pension in respect of death only when death was as a direct result of enemy action, or counter-action taken against the enemy, which includes extraordinary marine hazards occasioned by the war.

There have been a limited number of cases in which the dependents, due to illiteracy, ignorance of their statutory rights, lack of dependency at the time of death, or other reasons, failed to make application within the statutory time limit.

In view of the limitations contained in section seven, the removal of the time limit in respect of death would affect only a small number of cases and would permit of an award being made in certain cases of hardship.

There have been no further amendments to this legislation since that time.

COMMITTEE RECOMMENDATION

(147) That the Civilian War Pensions and Allowances Act be amended to remove the time limit of one year during which application must be made following the occurrence of a disability in respect of which pension is claimed.

Time Limit
Removed

COMMENT

Your Committee notes that, under Section 9 (1) of the Civilian War Pensions and Allowances Act, a time limit of one year is imposed following the occurrence of a disability and that no pension may be awarded unless application is made therefor within one year of this occurrence. Section 9(2) provides that the Commission, in its discretion, may extend this time limit where a "lack of communication facilities prevented a person from making an application."

It may be that the existence of this extension in the Act is sufficient to take care of deserving cases where application was not made within the one year time limit. Notwithstanding, your Committee considers that the imposition of a time limit for application for pension is not justified. Hence, despite the existing provision by which that time limit may be extended, your Committee has seen fit to recommend the removal of the limit from the Act.

The history of pension administration appears to support the contention that a disability may occur many years following an injury or disease contracted during service. There seems no valid reason for the time limit in the administration of pensions for Merchant Seamen and Saltwater Fishermen who served during time of war.

The implementation of this recommendation would not necessarily result in pension for an applicant. It would, however, provide more reasonable ground rules under which the Commission could consider whether the disability was attributable to service, and was the direct result of enemy action or counter action taken against the enemy as required by the Act.

REFERENCES

1. R.S.C. 1952, C. 51 S. 9(1)(2)
2. Proceedings of Committee Sessions, Volume VI, page GG-5
3. Order-in-Council, P.C. 3359, November 10th, 1939, Regulation 4
4. SC 1946, C.43 s.9, assented to August 31st, 1946.
5. SC 1948, C.51, assented to June 30th, 1948
6. Bill 393 as passed by the House of Commons, June 22nd, 1948.

CHAPTER 43DEFINITION OF "THEATRE OF ACTUAL WAR"GENERAL

Section 2(v) of the Act defines "service in a theatre of actual war" by zones as follows:

- (i) in the case of the army or air forces during World War I, service in the zone of the allied armies on the continents of Europe, Asia, or Africa or in any other place at which the member of the forces has sustained injury or contracted disease directly by a hostile act of the enemy;
- (ii) in the case of the naval forces during World War I service on the high seas or wherever contact has been made with hostile forces of the enemy, or in any other place at which the member of the forces has sustained injury or contracted disease directly by a hostile act of the enemy;
- (iii) in the case of the naval, army or air forces during World War II, service on the sea, in the field or in the air, in any place outside of Canada; or service in any place in Canada at which the member of the forces has sustained injury or contracted disease directly by a hostile act of the enemy;

Other Sections of the Act where "theatre of actual war" is involved are as follows:

Section 13(c): The Pension Act makes provision, in Section 13(c), that no deduction shall be made from the degree of actual disability of any member of the Forces who has served in a theatre of actual war on account of any disability or disabling condition that existed in him prior to his period of service, provided that the condition was not obvious or was not recorded on medical examination prior to enlistment. Further explanation of this provision in the Act, together with your Committee's recommendations concerning these matters, will be found in Chapter 7 dealing with pre-enlistment conditions.

Section 13(3): The definition of "theatre of actual war" is involved also in Section 13(3) of the Act, which provides that pension for disability or death awarded in respect of military service during World War II cannot be made retroactive beyond June 1st, 1946, unless the member of the Forces served in a theatre of actual war.

Section 14(4): This Section provides that pension may be granted in a case of venereal disease contracted prior to enlistment and aggravated during service, if the member served in a theatre of actual war.

General

Section 15:

This Section provides that, in respect of military service during World War I, pension for disability shall not be awarded where application therefor is made after July 1st, 1936, unless the member saw service in a theatre of actual war.

Section 28(3): This Section provides that pension for pulmonary tuberculosis can be paid at 100% and continued without reduction for a period of two years for members who served in a theatre of actual war and whose disease was attributable to, or was incurred or aggravated during service; and for those who did not serve in a theatre of actual war provided that the disease was incurred during service. This subsection provides also that, in a case of a member of the Forces whose disease was aggravated during service and who did not serve in a theatre of actual war, the pension is payable at 90% and continued without reduction for a period of two years.

The definition in Section 2(v) prescribes the territory which can be called a "theatre of actual war" in the meaning of the Act, but does not set out the time during which such territories are considered to be actual war zones.

Section 2(x) of the Act defines the period of World War I as being between August 4, 1914 and August 31st, 1921. Section 2(w) defines World War II as being between September 1st, 1939 and April 1st, 1947.

The Pension Commission, and its predecessor, the Board of Pension Commissioners, have taken the view that the word "actual" limits the meaning of "service in a theatre of actual war". Hence, the policy has been followed that, in respect of World War I, service in a theatre of actual war for the purposes of the Pension Act terminated after midnight on November 11th, 1918, i.e., the date of the World War I Armistice. The policy in respect of World War II is that service in a theatre of actual war in the European Theatre terminated as of VE Day, i.e., May 9th, 1945 and in the Pacific Theatre as of August 15, 1945.

REPRESENTATIONS AND EVIDENCE

Royal Canadian Legion: The Legion submitted the argument to your Committee that, inasmuch as the dates for the termination of World War I and World War II are given in the Pension Act as August 31st, 1921 for World War I and April 1st, 1947 for World War II, the Pension Commission should not have the right, by interpretation, to limit the periods of time during which theatres of actual war are said to have existed.

Mr. Donald M. Thompson, Dominion Secretary of this organization, referred to Section 2(v) of the Pension Act after which the following discussion took place during the Legion's hearing before your Committee on February 1st, 1966:¹

Mr. Thompson: Now, I would draw to your attention, gentlemen, that the important date here in this quotation is the first day of April, 1947.

Mr. Justice Woods: As ending World War II.

Mr. Thompson: As officially, for the purposes of the Pension Act, ending World War II.

The Pension Commission, where "entitlement has been conceded on an aggravation basis only, despite the fact that the pensioner served during World War II in a theatre of actual war as above defined, has refused to invoke the provisions of Section 13(1)(c) and grant full entitlement.

Now, 13(1)(c) you will recall, is the Section that makes special provision for men with service in the theatre of actual war, pre-enlistment conditions.

The Commission has advised that it regards the actual termination of hostilities in the European theatre was on 9.5.45 and 15.8.45 in the Pacific theatre.

Rather than by the Act, and the point here, sir, we believe that the Commission should not have the right to by interpretation, take something away as plain and simple and evident as a period covered by dates set down in the Act.

Mr. Justice Woods: Well, because World War II ended on April 1st, 1947, does that mean it was going on everywhere until that time? I mean, necessarily, does it necessarily mean that? You are more or less taking the position that it does, I would say.

AND THE WITNESS

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The Commission has advised that it regards the actual termination of hostilities in the European theatre was on 9.5.45 and 15.3.47 in the Pacific Theatre.

Neither that by the Act, and the point here, sir, we believe Commission should not have the right to by interpretation, taking away as plain and simple and evident as a period covered by dates set down in the Act.

Mr. Justice Woods: Well, because World War II ended on April 1st, 1947, does that mean it was going on everywhere until that time? I mean, necessarily, does it necessarily mean that? You are now or less taking the position that it does, I would say.

Representations and Evidence

Mr. Thompson: Well, we are taking the position, sir, that the Act defines the period of the War.

Mr. Justice Woods: Yes; the Act defines the period of the War. All right, there is World War II going on. Does this mean to say it is going on everywhere; other places in the world? That there is a war other places in the world; there is a theatre of war?

Mr. Thompson: No, it does not necessarily mean --

Mr. Justice Woods: And does it mean it cannot stop someplace and keep on going elsewhere?

Mr. Thompson: No; it doesn't mean that either. It could be going on in some sections and not others.

Mr. Justice Woods: I am not suggesting the Canadian Pension Commission is right or that you are right, but I think or I suggest you are drawing a pretty long bow when you say that it necessarily follows that just because World War II is still on that Europe is still a theatre of war.

Mr. Thompson: Well, sir, I would say that it is not unknown in the Veterans' Legislation to have these situations develop. For instance, as you know, for many years in the War Veterans' Allowance Act, the man who was in the navy and sailed on the high seas saw service in the theatre of actual war in World War I, but your World War I army man that went across -- and mind you, the navy man may only have made one trip across the sea-- the army man that went over in a troop transport was not eligible for War Veterans Allowance. So these situations exist where what is spelled out in the Act does not always fit what conditions may have been in different parts of the world at that time.

Mr. Justice Woods: No, I appreciate that; that is perfectly true. But I do not see that just because the Act says that World War II ended on the 1st day of April, 1947, you can draw the conclusion that this necessarily means there was war until that date in other places where there had been any fighting.

Mr. Thompson: No, we can see that, sir; that is not necessarily so.

Mr. Justice Woods: No, this is not to say your view is wrong, you appreciate that, I am not advancing that. I just do not logically reach the same conclusion as you do easily.

Mr. Thompson: If I might point out that this Section of the Act and Section 13 is not talking about fighting in a war, it is talking about a theatre of actual war.

Mr. Justice Woods: Yes.

Representations and Evidence

Mr. Thompson: And as I pointed out, sir, in the case of the War Veterans' Allowance instance, the man actually sailed through a theatre of actual war and I suggest, if we think in terms of a war as necessarily fighting, then it can be said the Commission is right. But under the Act it refers to the service in a theatre of actual war, and then defines this. Service in the theatre of actual war is used in Section 13(1)(c), and this is why we believe the Act is concerned with defining service in a theatre of actual war and, quite naturally, ignores the fact there may have been fighting some places and not others.

Mr. Justice Woods: Well, in what form is this advice given about these dates? It says:

The Commission has advised that it regards the actual termination of hostilities in the European theatre was on 9.5.45 and 15.8.45 in the Pacific theatre.

In what form is this?

Mr. Thompson: This advice comes to us in several forms and I can make this information available to you in a few of these forms that we have received it. Now, one is a letter from the Pension Commission dated September 9th, 1963, our Legion file No. is 240-7.

Mr. Justice Woods: They sent you a letter.

Mr. Thompson: Right. Would you like me to read this letter?

Mr. Justice Woods: No, no. Any other way?

Mr. Thompson: Then another is a C.P.C. -- I was going to say directive, but actually it isn't labelled that. It is on a C.P.C. letterhead, mimeographed form dated Ottawa, April 21st, 1964, and it says:

"Pension Commission Staff"

And it sets forth re service in the theatre of actual war, and goes on to state the policies.

Mr. Justice Woods: So you got a letter and a mimeographed form?

Mr. Thompson: Right. Then we have received it in another letter on a case, from a member of the Commission.

Mr. Justice Woods: How did this first letter come to you? Did they volunteer it, or did it arrive out of a problem you were dealing with?

Mr. Thompson: The advice first referred to in the letter was the result of a letter from the Legion to the Chairman of the Commission on August 30th, 1963, in which we requested:

Representations and Evidence

In order that we may study this matter more completely, would you please advise us whether or not this policy of the Commission is in written form and whether or not the said policy is a regulation within the meaning of Section 8 of the Act.

Mr. Justice Woods: They actually got the letter?

Mr. Thompson: No, the letter that I referred to from the Chairman, sir, followed this request. The Chairman's letter was in reply to our request and they quoted the policy which was apparently arrived at in January, 1961.

Mr. Justice Woods: The effect here then of this policy or view of the Canadian Pension Commission, is then that, as you understand it, if a man went overseas to Europe after VE Day, he would not receive full entitlement on an aggravation award?

Mr. Thompson: That is right, sir; he would not receive the full benefit of 13(1)(c). If there was an aggravation, and if the Commission does not have to produce a record, then a man stands to lose the benefit.

Mr. Justice Woods: So, one of the things you object to here in the interpretation is that you have a number of theatres of war all ending at different times, according to the Commission's ruling. Whereas, under (v) (iii) and (x) of Section 2, you feel for the purposes of the problem we have here, that theatre of war should continue until the 1st of April, 1947?

Mr. Thompson: Yes, sir, because we feel it so states in the Act that the Commission should not have the right to restrict by interpretation.

Mr. Justice Woods: Now, the man going to Europe after VE Day: how would he stand with regard to the insurance principle? Would he still be covered by it?

Mr. Thompson: It still applies.

Mr. Justice Woods: Would he lose this one?

Mr. Thompson: Right. We believe this further strengthens our argument that he should have the whole and not just part.

Representations and Evidence

Canadian Pension Commission: Mr. T.D. Anderson, the Commission Chairman, told your Committee that the Commission, in its definition of "theatre of actual war" was required to use the dates upon which actual hostilities ceased. The following discussion during Mr. Anderson's appearance before your Committee under date of March 21st, 1966 is recorded hereunder: ²

Mr. Anderson: The Commission cannot do otherwise than regard 9.5.45 and 15.3.45 as the dates of actual termination of hostilities in the European and Pacific Theatres respectively, because those are the dates upon which actual hostilities did cease in those areas.

Mr. Justice Woods: That is, under the law?

Mr. Anderson: Yes, that is right.

Surely it is not suggested that we should completely disregard simple facts in dealing with pension claims.

Now, the question is asking here is that those who spent the war years in Canada and then made a trip to Europe or Asia after the cessation of hostilities be given the same consideration as those who spent years in either of those theatres during hostilities. If I understand their submission correctly, the benefit would be, by and large, to this group only. The Commission does not agree with this interpretation of the section. We believe that it is impossible to serve in a theatre of actual war during a time when there is in fact no actual war.

Mr. Justice Woods: By "actual war" you mean under the law?

Mr. Anderson: I mean shooting.

Mr. Justice Woods: But it is a theatre of war until the constituted authority says that it isn't, or until the necessary order-in-council is made, or whatever is involved?

Mr. Anderson: No; it depends on how you look at it. I can think of the dictionary meaning of the word "war" which is the shooting war.

Mr. Justice Woods: You don't pay any attention to when the Government says that the war ended?

Mr. Anderson: Yes.

Mr. Justice Woods: You consider it has ended when the firing stops.

Mr. Anderson: That would be when the people stopped shooting at each other.

HISTORY

The definition of "Theatre of Actual War" was included in the original Pension Act of 1919 and read as follows: ³

1919

- 2 (n) "Theatre of actual war" means:
- (i) in the case of the Military or Air Forces, the zone of the Allied Armies on the continents of Europe, of Asia or of Africa or wherever the member of the forces has sustained injury or disability directly by a hostile act of the enemy;
 - (ii) in the case of Naval Forces, the high seas or wherever contact has been made with hostile forces of the enemy, or wherever the member of the forces has sustained injury or disability directly by a hostile act of the enemy;

The explanation given in the annotations ⁴ was as follows:

The words "theatre of actual war" in so far as they concern the vast majority of cases means France or Belgium. They do not mean the British Isles except in so far as air raids, etc., are concerned. These words are used in Sections 2(a) and 25(3).

Section 2(a) of the original Pension Act read as follows: ⁵

- 2(a) "appearance of the disability" includes the reappearance of a disability which has been reduced sufficiently to permit the member of the forces to serve in a theatre of actual war;

The explanation concerning Section 2(a), given in the annotation to the Pension Act prepared under date of July 1st, 1919, is relevant to the history of "theatre of actual war" and read, in part, as follows: ⁶

It was found necessary to define the words "appearance of the disability" for the reason that the mere words if taken literally would exclude from pensionability many who are clearly entitled to a pension, or would cause pension to be awarded at a lower rank than the rank in accordance with which the particular member of the forces is pensionable.

These words are found in sections 14(1), 14(2), 23(2), 23(b), and 33(1). If a wound, injury or disease does not unfit a member of the forces for service in a theatre of actual war (see Section 2(n) or only temporarily unfits him for such service is not considered a disability in so far as the loss of any advantage is concerned. If he is promoted after such a disability or is married or adopts children, etc., his widow or children will not lose if he is later killed, and he himself will not lose if he is disabled.

History

Section 25(3) of the original Pension Act of 1919, to which reference was made in the annotation concerning Section 2(n) dealing with "theatre of actual war", read as follows:⁷ 1919

- 25(3) No deduction shall be made from the pension of any member of the forces who has served in a theatre of actual war on account of any disability or disabling condition which existed in him previous to the time at which he became a member of the forces; provided that no pension shall be paid for a disability or disabling condition which at such time was wilfully concealed, was obvious or was not of a nature to cause rejection from service.

The annotation read:⁸

For more than two years efforts have been made from various quarters to have pensions awarded in accordance with the disability existing in the man at discharge, whether the whole or a proportion of that disability existed in him at the time of enlistment or not. In the early years of the war owing mainly to the need, men were enlisted who, while fit for the service for which they were intended were not absolutely fit from the point of view of occupation in the general labour market. Many were also enlisted who were not even fit for the less arduous of the duties of military life. Many of these unfits were discharged before leaving Canada; many more were discharged in England, only the most fit were taken to France. Again many men who were recognizedly unfit for service in the front line were enlisted in forestry, railway construction and other similar battalions.

The Parliamentary Committee of 1918 came to the conclusion that if any man reached a theatre of actual war it must be definitely presumed that he was absolutely fit upon enlistment unless it could be proved that there was a pre-enlistment disability which was concealed or was obvious or was of so minor a nature as not to cause rejection from service.

Section 2(a) of the Act was amended under date of July 1st, 1920 to read as follows:⁹ 1920

Appearance of the injury or disease includes the recurrence of an injury or disease which has been so improved as to have removed the resultant disability.

The new wording made no reference to service in a theatre of actual war.

The interpretation of the meaning of "theatre of actual war" was dealt with in correspondence with the Minister of Justice in 1929. In a letter 1929

History

from the Deputy Minister of Justice dated January 11th, 1929, and addressed to the Secretary of Board of Pension Commissioners, the following statement appears: ¹⁰

I agree with the view of the Board that the words "theatre of actual war" have application only to the period of actual hostilities.

Based on this interpretation, the Board of Pension Commissioners appears to have adopted the interpretation that World War I, for the purposes of this decision, concluded on November 11th, 1918.

Section 2(a) of the Act which defined "service in a theatre of actual war" was expanded in 1941 to include those zones involved in World War II. 1941

There has been no substantial change in the wording of the definition of "theatre of actual war" since that time.

At a meeting on December 29th, 1960, the Pension Commission confirmed the following definitions in regard to "theatre of actual war". ¹¹ 1960

1. Service in France during World War I subsequent to midnight 11 November, 1918 was not service in a theatre of actual war within the meaning of Section 13(1)(c) of the Pension Act.
2. For the purpose of application of the provisions of Section 13(1)(c) of the Pension Act, service during World War II in all areas excepting service in the Pacific theatre, shall cease to be considered as service in a theatre of actual war as of midnight 9 May, 1945 (V.E.Day). Service in the Pacific Theatre shall cease to be considered as service in a theatre of actual war as of 15 August, 1945 (V.J.Day)

COMMITTEE RECOMMENDATION

(148) That the Pension Act be amended to provide that the definition of "theatre of actual war" should state specifically that it refers to the period of time during which a member of Armed Forces could engage or be engaged by the enemy, and should terminate, in the case of World War I, on November 11th, 1918 and for World War II, on May 9th, 1945 for the European Theatre and August 15th, 1945 for the Pacific Theatre.

Termination
Dates For
Theatre of
Actual War

COMMENT

It is obvious that a clear understanding is necessary as to both the time and place which the Commission can consider as being within the meaning of a "theatre of actual war".

In the view of your Committee, this matter can be resolved by referring to the intent of the legislation. The term "theatre of actual war" first came into the Pension Act in 1919¹² on the grounds that those who served in the theatre of actual war should be presumed to have been physically fit on enlistment. In other words, the implied test was that, because their physical category was considered to be of sufficient soundness to permit them to engage, or be engaged by the enemy, they were entitled to the presumption that any pre-enlistment disabilities were minimal, unless such had been obvious at time of enlistment or had been recorded on medical examination prior to enlistment.

The annotation to the 1919 Act appears to make this abundantly clear wherein it states: ¹³

The words "theatre of actual war" in so far as they concern the vast majority of cases means France or Belgium. They do not mean the British Isles except in so far as air raids etc. are concerned.

Your Committee notes that, in reply to an enquiry from the Board of Pension Commissioners in 1929, the Department of Justice gave the opinion that "theatre of actual war" applied only to the period of actual hostilities. It would appear from the correspondence that this opinion was given in regard to the type of case where a decision from the Board of Pension Commissioners was required in respect of pre-enlistment disability. It would seem, therefore, that the opinion from the Department of Justice could be accepted as reflecting the thought that "theatre of actual war" was meant to extend the presumption of sound condition to a member who, in the opinion of military authorities, was considered sufficiently healthy to enter a war zone. This, in the view

Comment

of your Committee, could apply only when there was a danger of engaging, or being engaged by the enemy. Therefore, "theatre of actual war" would not be applicable following the termination of actual hostilities.

The position of the Royal Canadian Legion in this matter is an understandable one. In the absence of specific direction in the Act, and of any explanation from the Commission so far as your Committee can determine, the Legion properly took the view that "theatre of actual war" as set out in Section 2(v) of the Act would be subject only to the limitation of the periods of time set out in 2(w) and 2(x) which provide termination dates of August 31st, 1921 for World War I and April 1st, 1947 for World War II. Accordingly, your Committee considers that the definition of "theatre of actual war" should be given a more explicit definition in the Act.

References

1. Proceedings of Committee Sessions, Volume III, page L-65
2. Ibid, Volume IV, page R-26
3. SC.1919, C-43, assented to July 7th, 1919
4. Pension Act with annotations, July 1st, 1919
5. SC.1919, C-43, assented to July 7th, 1919
6. Pension Act with annotations, July 1st, 1919
7. SC.1919, C-43, assented to July 7th, 1919
8. Pension Act with annotations, July 1st, 1919
9. SC.1920, C-62, assented to July 1st, 1920
10. Canadian Pension Commission subject file on Theatre of Actual War.
11. Ibid
12. SC.1919, C-43, assented to July 7th, 1919.
13. Pension Act with annotations, July 1st, 1919.

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PROPOSED REMEDY FOR LACK OF APPELLATE PROCEDURE

I. INTRODUCTION OF THE OMBUDSMAN PRINCIPLE

The following is a minority report but on one question only.

This member concurs in the main report in all its recommendations except the one relating to appeals both from final decisions of Appeal Boards of the Commission and from decisions or orders of the Commission itself. This member agrees that the present Appeal Boards should be named Entitlement Boards and that they should function as outlined in the main report.

The question on which this member of the Committee, hereafter referred to as "this member", differs from the recommendation in the main report is in regard to what steps should be made available to an applicant after he has exhausted all his present procedural rights under the Act and still feels aggrieved.

At the outset it should be stated that this member is fully in agreement with what he believes to be the view of the Committee as a whole, namely, that it is not sound in principle, nor conducive to the most effective implementation of the Pension Act, that appeals should be from one or more members of the Commission to another group of the Commission. It is a strain upon the human mind, both in its strength and in its weakness, to review decisions reached by fellow confreres.

This is emphasized, almost to the point of being labored, because all members of the Committee are agreed that a defect exists which should be remedied. A door has to be opened to a person within the provisions of the Act who has exhausted all his remedies by way of applications to the Commission but still feels that he has not received justice within the true meaning and intent of the Act.

In the main report the recommendation is made that an Appeal Board, wholly outside the Commission, be created to which appeals could be taken from any decision of present Appeal Boards (to be renamed Entitlement Boards) and from decisions or orders of the Commission itself.

This member is opposed to the establishment of an Appeal Board under the provisions of the Pension Act. Aside from some particular reasons set out below, there are two main reasons for the position taken. One is that past experience with Courts or Boards of Appeal under the Pension Act has not been satisfactory. But even if the difficulties of the past could be avoided there is another and a more cogent reason. The nature of the service rendered by those who come under the provisions of the Act and the attitude of the Canadian public towards that service have created imponderables to which a court of appeal or a board similarly constituted might not give proper effect. There should be more flexibility in the procedure available to an applicant who feels that the decision reached on his claim does not reflect that attitude nor meet his own sense of justice. The best results, in this member's view would be obtained if the office of an Ombudsman were created to supply a form of appeal outside the Pension Commission.

This member is recommending that the principle of Ombudsman be brought into the Act and that the services of an Ombudsman be made available to applicants within the provisions of the Pension Act who feel that the true and fair intent of the Act has not been applied in the disposition of their claims.

On Tuesday, November 8th, 1966, as recorded in the Minutes of the 19th Meeting of the Committee, this member advised the Committee of his intention to submit a supplementary report. As explained, the conclusion reached by the Committee to recommend the establishment of an Appeal Board was satisfactory to this member at that time.

On further consideration, this member came to believe that an appellate procedure involving an Appeal Board would not provide the best remedy and, indeed, is not needed. Accordingly, this member is submitting a remedy which he considers to be more suited to the provisions and the real intent of the Act, namely the office of an Ombudsman.

The general principle is well known and has of late been widely discussed. An Ombudsman has been defined as a "watchdog", "guardian of the law", "tribune of the people". Perhaps a variation could be designed to fit into the Pension Act: a protector of the rights and claims of ex-servicemen which a grateful country feels should be given full recognition.

For the purpose of this minority recommendation, the term Ombudsman will be used, and it is this member's view that no better term could be selected to identify the office which this recommendation envisages.

Reference has been made in the main report to the studies in Great Britain relating to Administrative Tribunals (See Volume I, Chapter 4, pages 91 to 93)

Particular emphasis was given to the enquiry in Britain, in 1956-1957, into administrative tribunals carried out under the chairmanship of the Right Honourable Sir Oliver Franks. Following this enquiry, the United Kingdom government established a "Council on Tribunals", charged with the responsibility to "keep under review the constitution and work of tribunals".

This member would like to refer to two authorities who have given study to the "no man's land between the legal and administrative worlds", with particular emphasis on the voluntary tribunals or agencies that could be set up.

H.W.R. Wade, Reader of English Law in Cambridge and Professor of Law in Oxford, wrote a book on "Administrative Law". In Part VII he dwells at considerable length on "Special Tribunals" and in particular on the Franks Report.

The following are pertinent extracts from Part VII: ¹

Outside the ordinary Courts of Law there is a host of special statutory tribunals with jurisdiction to decide legal disputes.

The Council on Tribunals has been set to work, and the need to regulate the no man's land between the legal and administrative worlds has at last been acknowledged. These may be first steps in a new and important road. (End of Pt. VII).

In 1963, J.F. Garner, LL.M., Senior Lecturer in Law, University of Birmingham, published a book entitled "Administrative Law". He discusses the Council on Tribunals at considerable length and says: ²

The Council is an advisory and consultative body only, having itself no adjudicatory or executive powers, and it is in no sense a super-tribunal, nor a court of appeal from tribunals.....

The author, however, adds this footnote:

None the less, the investigation of individual complaints seems to be an increasing feature of the work of the Council on Tribunals; it is said in their Second Report (at page 7) "within this field (that of tribunals and inquiries) it is our task to act as a watch-dog for the ordinary citizen and to see that he gets fair play."

A first question arises: Will an Ombudsman be able to remedy the grievances which were placed before the Committee? The primary duty of this Committee of Enquiry, in the view of this member, was to ascertain what ills or defects were to be remedied in order that justice be done to discharged members of the forces and their dependents. It is a matter of more than little moment that all three members of the Committee agreed upon what appeared to be the defects which brought about the complaints submitted to this Committee.

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In this member's view the main areas are the following:

- (a) Interpretation of the Act.
- (b) Absence of an appeal from present Appeal Board decisions.
- (c) The benefit of the doubt section.
- (d) Deficiencies in the legislation.
- (e) Administrative weaknesses.

(a) Interpretation of the Act

This member's view is that only in the most exceptional cases should an administrative body be the final interpreter of the Act under which it operates. Without any implied criticism, but merely as a statement of human frailty, it is well not to throw into oblivion the warning uttered by Lord Acton when he said: "All power corrupts; absolute power corrupts absolutely".

Obviously the resolving of conflicts in interpretation should not be a duty placed upon the Ombudsman, but this member has made an alternative proposal regarding final determination of interpretations, as embodied in this Minority Report.

(b) Absence of an Appeal from Present Appeal Boards of the Commission

Acts providing for the creation of administrative bodies are multitudinous and no particular pattern of appeal can be detected; nor could any be devised to apply to all cases. In some cases no provision is made for appeals from decisions of the administrative body set up in the particular Act. In others some form of appeal is provided.

If the Pension Appeal Board, suggested in the main recommendation, is not acceptable, questions will undoubtedly arise whether an appeal from the contemplated Entitlement Board is necessary, and whether the appointment of an Ombudsman would fill the need.

The Royal Canadian Legion, in its brief made to the Committee, laid more emphasis upon the need of a proper interpretation of Section 70 (benefit of the doubt) than upon a procedure for appeals from final decisions of the Commission. Notwithstanding, this member suggests that a provision for an appeal, whether direct as recommended in the main report, or indirect or implied in case the principle of an Ombudsman is introduced, has a salutary effect upon anyone acting in a judicial or a quasi-judicial capacity. Some form of review should be established and it is the opinion of this member that the Ombudsman institution is the most appropriate procedure.

(c) The Benefit of the Doubt Section

The benefit of the doubt in the Pension Act, in the view of this member of the Committee, is different to the benefit of the doubt given to an accused in criminal cases. The former rests upon a feeling of gratitude coupled, in many cases, with difficulties of obtaining evidence. The latter rests upon the sound principle that it is better that some guilty person escape punishment than an innocent person be convicted. The benefit of the doubt brought into the Pension Act is not something static which is fixed or can be easily defined. To put it in a practical way, the benefit of the doubt should be given more generously on an application under this Act, than in a criminal case. In this area an Ombudsman should be able to exercise an influence, if it appears that a decision is not what is expected by the Canadian public.

This generous approach should be the guiding principle in the interpretation and in the carrying out of the provisions of the Pension Act. Except in the case of extremes that were applied towards the close of each of the World Wars, enlistments in the Canadian Forces have always been on the voluntary principle. The gratitude of a nation for voluntary service which involves unusual risks and real danger to life itself should be a factor in the administration of the Pension Act.

(d) Deficiencies in the Legislation

This Committee observed a number of deficiencies in the Act. For example, Section 28 of the Act provides that pension shall be paid to the extent of the assessable degree of the disability. Notwithstanding, Schedule "A" provides what is somewhat arbitrarily fixed as a 100% pension which, at current rates, represents a payment of \$2,760 annually.

Your Committee proposes, on the evidence established in a most convincing manner, that there is a requirement in cases of multiple disabilities in a substantial extent, that such be rated in excess of 100%. This can be accomplished only through an amendment in the legislation and the Committee has made a recommendation in this regard. An Ombudsman, charged with the responsibility of keeping the Act constantly under review, would in all probability spot legislative deficiencies and, with or without the approval of the Commission, bring them to the attention of the Minister and of Parliament for remedy.

(e) Administrative Weakness

To err is human. It is also human to become indifferent, or to build up a conviction that years of experience have moulded perfection. To a greater or lesser degree this applies to all administrative bodies. It is in this area where an Ombudsman of the right type can perform very valuable service. The Committee's report directs attention to more than a few instances where some infirmity or failure had crept into the administration, quite possibly without the knowledge of the Commission. It is visualized that, in a sense, the establishment of an Ombudsman would serve as a continuation of the process of evaluation of complaints, and of recommendations for their remedy, which has been undertaken by this Committee.

II. SOME OBSERVATIONS ON THE PROPOSED PENSION APPEAL BOARD

This member is of the opinion that the proposed Pension Appeal Board would not meet the need in full. Neither is it fully practicable. He considers that an Ombudsman would come much closer to filling that need and hence is the more appropriate remedy. He bases his opinion on the following, among other grounds:

- (a) Cost: The expenditure of public funds to establish a Pension Appeal Board at this stage may not appear justifiable.
- (b) Similarity to Court: There is the probability that the proposed Pension Appeal Board might be looked upon as a court, which apparently the ex-servicemen do not want. On the other hand, they might feel that in an Ombudsman they have a "friend in court" rather than an appeal body, no matter how objective it may be in its approach. Such confidence is exceedingly important.
- (c) Efficiency: Although no one can predict how heavy the work load would be, whether before an Appeal Board or an Ombudsman, there appears to be the likelihood that an Ombudsman of the type suggested and, acting in liaison with the Chairman of the Commission, would be able to dispose of applications more speedily than an Appeal Board.
- (d) Time Required to Establish: Consideration must be given to the time taken to establish the office of Ombudsman compared with an Appeal Board. The establishment of an Ombudsman should be a relatively simple matter whereas the setting up of an Appeal Board would involve the development of rules of practice and other formal procedures. If the decision is made to establish an appellate review it seems particularly important to avoid undue delay because of the age of some of the potential applicants who will understandably be anxious to have their cases reconsidered at once.
- (e) The "Us-Them" Theory: One of the recognizable grievances of an unsuccessful applicant for a pension or other benefit is that he has had to deal exclusively with what he terms "them", meaning the Commission. In his mind, in the first instance he applied to "them". Later he appealed to "them" and was turned down again. If a Pension Appeal Board is established there is the danger, no matter how fair the procedure, that applicants will still feel that they are dealing with "them", that is an outside body. A feeling of a combined "us-them" should exist and an Ombudsman could, in this member's view, provide the connecting link.

This may be an unfair attitude but it has grown through the years. The same situation does not seem to exist in countries where an Ombudsman operates. This is possibly because persons aggrieved and the public consider that he is on their side in the never-ending contest with the state. They look upon him as "their man". If a Pension Ombudsman were established in Canada, an unsuccessful applicant might well feel that his case was being handled by someone appointed to speak for him. (The Swedish word "Ombud" refers to a person who acts as a spokesman or representative of another person).

- (f) Scope of the Problems to be Handled: A Pension Appeal Board is limited to its duty of reviewing applications. All members of the Committee are in agreement that a review is essential; it is only the method of review on which there may be a difference of opinion. On the other hand, an Ombudsman can do more than exercise functions of review. In short, the Ombudsman may be in a position to assist in a more general way, in carrying out the provisions of the Act than the Pension Appeal Board. For instance he can handle complaints concerning administration.

An essential difference between an Appeal Board and an Ombudsman is this: An Ombudsman can cover the whole field - administration, appeals, amendments to the Act. An Appeal Board is limited to matters placed before it. An Ombudsman can originate steps that are not open to a body exercising only the powers of appeal. If, however, the proposed Appeal Board exercises more than the power of an appeal body, there is the danger that it might develop into a super-Commission.

- (g) Liaison with Commission Chairman: In the view of this member there should be close liaison between the Chairman of the Commission and the Ombudsman. In that way, the Ombudsman could become a most useful ally to the Chairman and, working together, these two officials could accomplish a great deal on behalf of persons coming under the Pension Act. If, however, an Appeal Board is created, there is always the danger of "court above" and a "court below" attitude, where one body is sitting in review upon the decisions of another body. In the view of this member, a similar liaison could not exist between the Chairman of the Commission and the Chairman of an Appeal Board.

- (h) Adversary Proceedings: There is general agreement that an appeal should not develop into an adversary proceeding. The recommendation of the Committee concerning the establishment of an Appeal Board suggests that the Commission should not be permitted to appear before the Board. This seems justifiable in view of past experience with the Federal Appeal Board (1922-1930) and the Pension Appeal Court (1930-1939).

Hence, the Committee found it necessary to recommend that, although the Commission could make a submission in advance, the proceedings before the Board should be limited to hearing argument by the appellant and those who represent him. There are sound reasons for this, as explained in the main report. This member considers, however, that if neither the Commission nor anyone on its behalf appears before the proposed Appeal Board, there is the probability that the Appeal Board would unconsciously, if not consciously, seek to meet the applicant's appeal, and thus unintentionally turn the appeal into an adversary proceeding.

On the other hand if an Ombudsman is appointed, and if a proper relationship between an Ombudsman and the Commission is established, there need be no fear of such development.

- (i) Historical Significance: In the view of this member, the unhappy experiences of the past, whenever provision was made for an appeal to a body outside the Commission, should not be overlooked. A serious effort should be made to try to resolve appeal problems in some other way. An Ombudsman would not be at a disadvantage because of prejudices which might exist against an Appeal Board.
- (j) Relationship with Office of Minister of Veterans Affairs: An Ombudsman, being a less formal institution than that of an Appeal Board, could possibly establish a useful working relationship with the office of the Minister of Veterans Affairs. The Ombudsman, provided that he was not bound by rigid rules of procedure, could deal with ministerial enquiries and could be generally helpful to Members of Parliament and others in regard to enquiries concerning applications and complaints placed before him by pensioners or dependents, or by others who might have a legitimate interest in the work and organization of the Pension Commission.
- (k) Relationship with Veterans' Bureau: It is suggested that the Veterans' Bureau should review all decisions from the Pension Commission adverse to the applicant and any which merit consideration would then be referred to the Ombudsman. An effective but informal relationship could be established between the Ombudsman and the Veterans' Bureau.
- (l) Relationship with Veterans Organizations: Similarly, an Ombudsman could establish good working relations with veterans organizations, without regard to formalities and rules which would presumably have to apply in proceedings before an Appeal Board.

- (m) Legally-trained personnel: The appointment of a Pension Appeal Board would possibly require extensive use of legal procedures, thus necessitating an increase in the number of legally-trained personnel required by the Veterans' Bureau and veterans organizations, and possibly by the Pension Commission itself. Reference has been made, in Chapter 10 of the main report dealing with the Veterans' Bureau, concerning the possible difficulty of obtaining legally-trained personnel to man the Veterans' Bureau. This same problem would presumably affect veterans organizations, should it become necessary to handle appeals through an Appeal Board. Also, the smaller veterans organizations would undoubtedly encounter some difficulty in regard to added expense. Should the Government appoint a pension Ombudsman, access to him on appeals could be a relatively simple matter, devoid of formal procedures. Legal training should not be a pre-requisite for persons representing the appellant.

III. THE RECOMMENDATION IN BRIEF

The Minority Recommendation is that, through an Act of Parliament, the office of Ombudsman may be created:

- (a) To review applications for entitlement or any other benefit under the Act.
- (b) To hear and investigate complaints in respect of any matter under the Pension Act.
- (c) To act in liaison with the Chairman of the Commission or anyone appointed by him in his place in his absence.

This Ombudsman would be assisted by a staff including a medical adviser and a research director. He would operate as an independent agent under the Minister of Veterans Affairs.

IV. THE PROPOSED ORGANIZATION AND PROCEDURE

General: Ordinarily, in recommending a certain course of action, a member of a Committee such as this would be justified in making the recommendation and leaving it to the Minister and the law officers of the Crown to set up the organization and lay out the procedure. However, the recommendation of applying the principle of Ombudsman to the Pension Act and the administration of same is so novel that it is deemed advisable to lay down in considerable detail the needed organization and methods of procedures.

Access to Ombudsman - Application: An applicant would petition the Ombudsman for a review of an application for entitlement or other benefit when he has exhausted his procedural rights under the Pension Act. The application would in the first instance be based on an unfavourable ruling from an Entitlement Board or, in a matter of discretionary benefit, an unsuccessful personal appearance under Section 7(3) of the Act. His petition could be in the form of a letter or by way of an official form, copies of which would be available at the District Offices of the Canadian Pension Commission and the Department of Veterans Affairs, and through veterans organizations. Petitions for review of an individual case could also be made through the Veterans' Bureau or a veterans' organization or any agency or private individual who might be considered to have a legitimate right to assist the applicant. But permission, in writing, from the applicant should be required.

Such applications could be accompanied by a formal submission from those representing the applicant and the Ombudsman should not refuse to review any application for benefits under the Pension Act.

Access to Ombudsman - Complaint: A petition for review of a complaint concerning administration or other matter under the Act could be made in a similar manner.

Investigation by Ombudsman: It is recommended that the work of the Ombudsman's office be carried out in private, and that his correspondence, minutes and other records be considered confidential, not available to the public. This is deemed necessary if the Ombudsman's office is to secure and maintain the confidence of officials of the Commission. Reports of the Ombudsman on the other hand would be considered public.

The Ombudsman must have complete access to all departmental records and must be permitted to discuss, on a confidential basis if need be, all and any aspects of a pension application or complaint with the Chairman, Deputy Chairman and all members of the Commission, and with any member of the staff of the Canadian Pension Commission, the Veterans' Bureau or the Departments of Veterans Affairs or National Defence. In addition he should be empowered to conduct investigations through any source outside of the Pension Commission or the Department of Veterans Affairs. If necessary, he should be able to consult independent medical, legal or other authorities, as required. All investigation and research should be carried out by the Ombudsman, or in his name by his staff advisers.

Report to Applicant: If, after investigation, the Ombudsman comes to the conclusion that an application cannot succeed, or a complaint is invalid, he would be required to send a "letter of advice" to the applicant, with copies to those who represented him, if applicable. This "letter of advice" would provide an explanation of the issues involved and the reasons for the conclusions reached by the Ombudsman. An exception could be made where the Ombudsman considers that information would be detrimental to the health or well being of the applicant or complainant, in which case he would be required to advise only those who have represented him. If no representative acted for the applicant, the Ombudsman would devise some other means of notification.

Application for Entitlement - Referral to Commission: The Ombudsman may refer an entitlement application to the Commission Chairman, where he considers that it should be reconsidered. The Commission Chairman may take action as follows:

- (a) sign an order for leave to re-open, on the basis of the Ombudsman's referral;
- (b) submit the case for consideration as an application for leave to re-open under the normal procedure of the Commission; or
- (c) investigate the application personally.

Under existing legislation, leave to re-open may be granted only by a special Appeal Board of the Commission. The Committee has recommended removal of some of the restrictions in this regard. It is this member's view that, if the Ombudsman proposal is accepted, the leave to re-open procedure should be liberalized even further, by giving the Commission Chairman authority to sign an order for leave to re-open, should he consider that evidence before him is sufficient to warrant re-consideration by the Commission as a re-instated application. This would not seem to be placing undue powers in the hands of the Commission Chairman, as his action would not imply approval of the application, but merely indicate that it should be reconsidered without the formality of a special "leave to re-open" board.

The purpose in suggesting that the Chairman be given this power is to enhance the liaison between the Chairman and the Ombudsman, and to hasten the proceedings in a case where the Chairman considers that formal study of the matter by a special Appeal Board under the "leave to re-open" procedure is not required.

Application for Discretionary Benefits - Referral to Commission. It is the view of this member that an Ombudsman would be able to render valuable service in all cases which come under the general term of discretionary benefits. Here proper liaison between the Ombudsman and the Commission is bound to have a salutary effect. On the other hand, if provision is made for an appeal to an Appeal Board from a discretionary decision, the somewhat legalistic position could be taken that an appellate body should not interfere with matters which are within the discretion of the Commissioner or Commissioners by whom the original application was heard.

The Ombudsman may refer an application for discretionary benefit to the Commission Chairman who may take action as follows:

- (a) Arrange for re-consideration by a quorum of the Commission.
- (b) Arrange for a personal appearance of the applicant before one or more Commissioners under the authority of Section 7(3) of the Act; or
- (c) Investigate the application personally.

If, after due consideration under one or more of the above alternatives, the application is not granted, the Chairman of the Commission will report the matter to the Ombudsman who will then have an opportunity of reviewing the file and determining the course and extent of re-consideration given the application by the Commission.

Complaint - Referral to Commission: In the matter of a complaint the Ombudsman will refer the details to the Chairman of the Commission who will undertake a personal investigation, reporting to the Ombudsman on any remedial action taken or recommended.

Action by Ombudsman: After receipt of a report of reconsideration of an application by the Commission, or after receipt of a report from the Commission, or after receipt of a report from the Commission concerning a complaint, the Ombudsman will again review the circumstances. If he considers that the action taken by the Commission is satisfactory he will prepare a report indicating agreement. If, on the other hand, the Ombudsman considers that an application should have been granted, or that the action taken in regard to a complaint is not satisfactory, he will prepare a report indicating disagreement. These Reports will be submitted to the Minister of Veterans Affairs and will be published quarterly with copies being made available to all interested parties including Members of Parliament, veterans organizations and the Press.

Rebuttal for the Commission: The Chairman of the Pension Commission should have the opportunity of filing a rebuttal concerning any matter reported to the Minister by the Ombudsman, and the Minister should make such rebuttal public if he considers it in the interests of all concerned.

Action by the Minister - Application: It is not contemplated, at the outset, that either the Ombudsman or the Minister should have the power to award entitlement or other benefit under the Pension Act. It is this member's belief that the basic problem, which may be cited as a lack of appeal outside of the Pension Commission, will be satisfactorily resolved by the institution of an Ombudsman with powers of referral back to the Commission and subsequently, if adequate redress has not been given, through authority to make public reports to the Minister.

It is not suggested that the Ombudsman should be given the power of final determination in regard to applications under the Pension Act. In the view of this member, the value of the Ombudsman's office lies in his influence upon the adjudication and administration of the Pension Commission. He should, where necessary, prevail upon the Commission to do its job; he should not, however, do the job for it. Moreover, if powers of final determination were conferred upon the Ombudsman, he could lose much of his effectiveness as he could no longer be considered as an impartial agent charged with an investigatory responsibility.

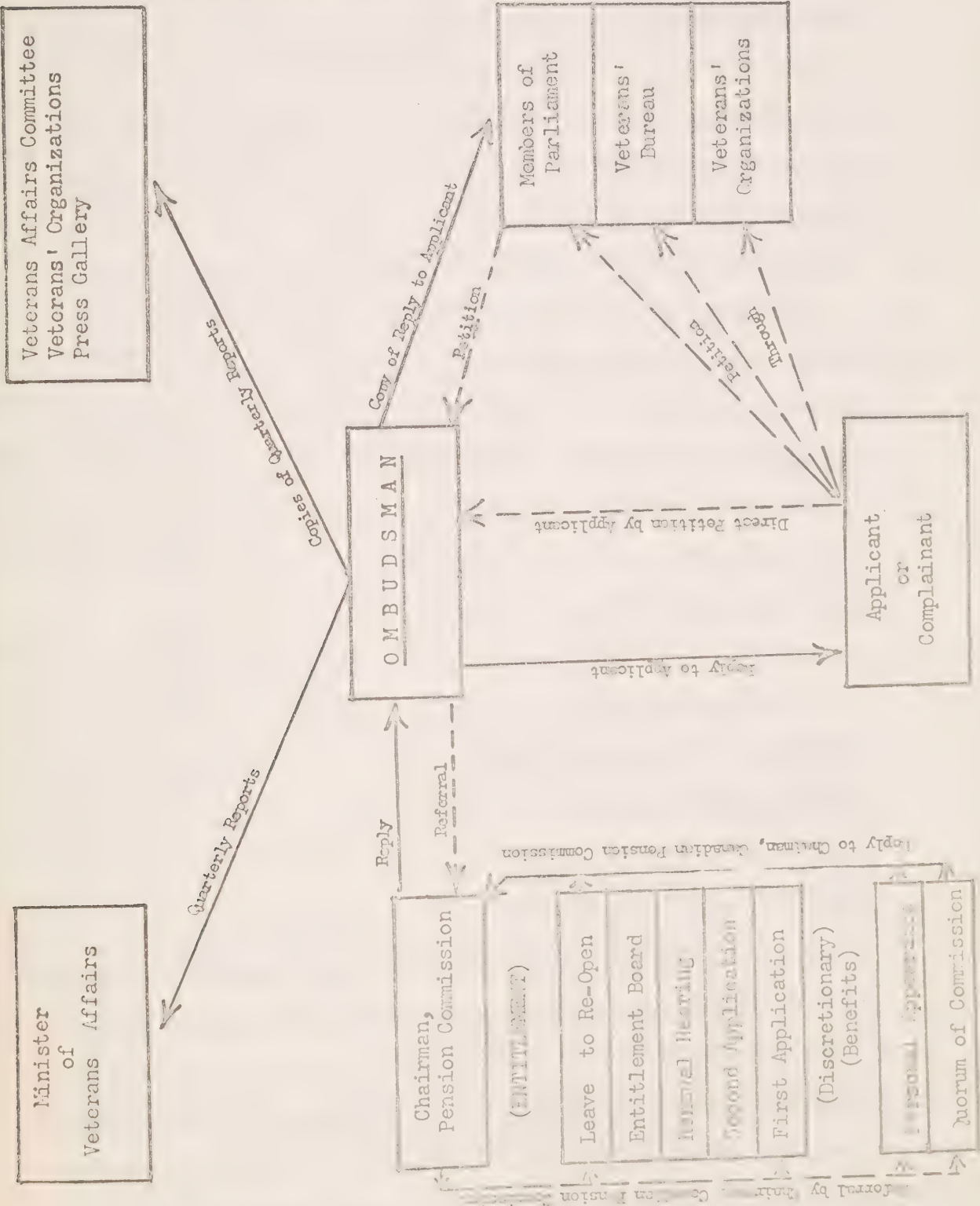
If, after a trial period of two years, the decisions of the Commission are unsatisfactory, or the influence of the Ombudsman is not as expected, consideration would have to be given to provide a power of intervention. This might be vested in the Minister, as in the case of some administrative boards, but with a limitation as hereinafter set out.

Action by the Minister - Complaint: The Ombudsman has reported to the Minister, to the effect that the Commission has not taken satisfactory action to remedy a complaint which, upon investigation, proved justified, the Minister should request that remedial action be taken by the Commission, so long as the matter is within the provisions of the Act.

Investigations on Initiative of Ombudsman: It should be considered as part of an Ombudsman's role to review the policies and practices of the Canadian Pension Commission from time-to-time. The Commission should be required to furnish to the Ombudsman, copies of its directives, including those governing revision of policy or practice and those establishing new policy or practice. The Ombudsman should be required to comment on any policy or practice of the Commission which he considers to be improper, or not in the best interests of all parties concerned in the administration of the Act.

The following chart illustrates the procedure envisaged for the office of Ombudsman:

PROPOSED OMBUDSMAN SYSTEM FOR THE PENSION ACT



V. INTERPRETATION OF THE ACT

General: It is suggested that the major fault in regard to interpretation which now exists is that the Commission has established written interpretations in only very few areas and, where there are written interpretations, few if any, are published and promulgated outside of the Commission. Accordingly, there is little opportunity for the veteran or those who represent him to examine these interpretations, and to protest against them, or to take positive action for an alternative interpretation where such is deemed necessary.

It seems obvious to this member that the administration of the Pension Act has suffered because of the lack of written interpretations of the legislation. It is perhaps logical to suggest that, had Parliament, the Minister or veterans organizations been aware of the denial of benefits to veterans arising from the interpretations --- even correct ones --- under which the Commission was operating, many of the legislative revisions now being recommended would have been effected years ago.

One frequent complaint made to the Committee was that, in the absence of published interpretation, it was not feasible to petition Parliament for clarification of any section of the Act which might require improvement.

Initial Interpretations: This member suggests that it would be satisfactory to leave the responsibility for initial interpretation with the Pension Commission on the understanding that:

- (a) The Commission would issue written interpretations regarding those Sections of the Act which appear to require them;
- (b) These interpretations would be promulgated in the form of Pension Law Directives; and
- (c) The Commission would permit the Veterans' Bureau and veterans organizations to appear before it to make submissions in regard to interpretations.

The publication of written interpretations would furnish an opportunity to the veterans and those who represent them to ask for remedial action by the Commission, or through legislative amendment where it is found that a section of the Act, as interpreted by the Commission, does not fill the intended need.

Final Interpretation: The main Report of the Committee suggests that the powers of final determination, presently set out in Section 5(5) of the Act, be removed from the Pension Commission and placed with the proposed Pension Appeal Board. As he is not recommending an Appeal Board this member suggests that errors and conflicts in interpretation should be resolved through referrals to the Department of Justice. If an opinion obtained from the Department of Justice is not acceptable to the Ombudsman, he should then have the right to ask for a final determination by the Supreme Court of Canada, or the Exchequer Court. There should be no cost to the applicant in such procedure.

This member is aware that there has been some hesitancy expressed in the past regarding the use of the Department of Justice to resolve errors or conflicts in interpretation. It is assumed that this hesitancy arises from the fear that the Department of Justice might give a less generous interpretation than would the Commission itself under its existing final powers of interpretation. To this member, this fear seems unjustified. The Department of Justice is the logical and official source through which the Federal administration can and does procure legal opinion regarding the interpretation of statutes. The procedure of referral to the Department of Justice is a standard one with most other administrative boards and commissions in the Federal Government. Where necessary, an opinion can be confirmed or altered by a referral as proposed above. Accordingly, there seems no reason why an interpretation of the Pension Act should not follow this normal practice.

VI. PROVISIONS RELATING TO OFFICE OF OMBUDSMAN

Qualifications: The selection of an appropriate person to fill the position of Ombudsman is of prime importance. If the Government can secure a proper person to fulfill the duties of the office, it is this member's conviction that many of the existing problems in the administration of the Pension Act would be satisfactorily resolved. Alternatively, an unfortunate selection would merely add to these difficulties.

The basic qualifications for this appointment should be that of experience in the administration of the Pension Act, coupled with personal suitability made known through the confidence reposed in the applicant by those who speak for veterans in Canada. Obviously, the candidate for the office of Ombudsman would have to be a person of stature and reliability. He would not necessarily require professional qualifications. In the view of this member it is far more important to obtain a man who has a firm grasp of pension matters, and who could act with the support of veterans organizations, than to rely upon purely academic standing. He would not be called upon to solve either legal or medical problems, hence he need not necessarily have either legal or medical training. These, and other necessary areas of specialization could be available to him through staff advisers or on referral to consultants.

Method of Appointment: An Ombudsman represents a very unusual post in the Government. He must necessarily have the confidence of both the public and the veteran population and, although he reports to the Minister of Veterans Affairs, he is also, in a sense, an agent of Parliament.

It is suggested, therefore, that his appointment should be made by the Governor-in-Council on recommendation of the Standing Committee on Veterans Affairs of the House of Commons, under a procedure by which this Committee would, in camera, review a nomination from the Minister of Veterans Affairs, returning such nomination to the Minister for his acceptance or otherwise. The Minister would then prepare a submission to the Governor-in-Council such to include the report from the Parliamentary Committee.

This somewhat unusual procedure is suggested in order to ensure that the Ombudsman would be accepted generally as a non-political appointment, made on the recommendation of a Committee which is usually representative of all parties in Parliament.

The appointment of Ombudsmen in other countries is often done under some form of special procedure. In Denmark the Ombudsman is appointed by Folketing (Parliament).³ In Finland the Ombudsman is appointed by Parliament and is known as the "Parliamentary Ombudsman".⁴ In New Zealand the Parliamentary Commissioner is appointed by the House of Representatives. Concerning the method of appointment in New Zealand, Mr. J. F. Northey, Professor of Public Law at the University of Auckland, New Zealand, states: ⁵

"But in practice it will not involve a radical departure from what has been done in the past; only the Government can be expected to have approached suitable qualified persons and secured provisional acceptance of the post. The Government, having a majority in the House, will normally be able to secure Parliamentary approval of its candidate. The method of appointment does emphasize, however, a special responsibility to Parliament not the Government. His main function, after all, is to act as a watchdog over a Departmental administration."

In Norway the Ombudsman is elected by the Storting (Parliament).

The relevant Section of the Norwegian Act is as follows.⁶

Section 1. "After each Parliamentary election the Storting shall elect an Ombudsman for the administration. The Ombudsman shall hold office for a period of four years from January 1st in the year following the Parliamentary election."

In Sweden the Ombudsman is elected, on behalf of Parliament, by a body of forty-eight electors who are, themselves, chosen by and from among the members of both Houses (24 from each).⁷ The Military Ombudsman in West Germany is elected, without participation of other constitutional bodies, by the Bundestag in plenary session by secret vote, based on a right of proposal from the Bundestag's Committee for Defense.⁸

Term of Office and Conditions: The Pension Ombudsman for Canada should be a lifetime appointment with compulsory retirement at age 75, or sooner at the incumbent's request. The appointee should be subject to the Civil Service Act in all respects except those of appointment and retirement. The suggestion for a lifetime appointment is made in the hope that it will enable the Government to secure the best possible man, who would accept the responsibility as a career appointment.

It should be provided that he could be removed only for cause and only by a majority vote of Parliament. This would give him the necessary independence and the protection to permit him to discharge his duties without fear or favour. The salary should be at a level above that of the Chairman of the Pension Commission.

Staff: The Ombudsman should be authorized to select and recommend the appointment of senior staff assistants subject to the approval of the Minister and the Treasury Board. His staff members should include:

Executive Assistant: This person should have a good knowledge of the Pension Act, and should be able to undertake full responsibility in regard to the investigation of cases and complaints. He should be familiar with welfare legislation generally, and should be able to read and interpret material pertinent to applications for entitlement and other benefits under the Pension Act.

Administrative Assistant: This person should be able to assume complete responsibility for administration of the Ombudsman's office, leaving the Ombudsman free to concentrate on the handling of applications and complaints. He should be able to undertake the dissemination of information relating to the work of the Ombudsman.

Medical Advice: The Ombudsman should be authorized to secure medical advice, through the engagement of a part-time medical adviser if required, augmented by the use of consultants available at leading medical schools and through other sources of competent medical opinion.

Legal Advice: The Ombudsman should be authorized to obtain legal advice through a part-time legal adviser if required, augmented by the use of consultants who have expertise in pension law in Canada and elsewhere.

The Ombudsman's office should be provided with clerical staff through the Department of Veterans Affairs, on requisition, and the Ombudsman should have full authority for control, assignment to duty and disposition of staff members. His requisitions for staff should be treated on an urgent and priority basis, but should be subject to authorization by the Minister and Treasury Board.

VII. RECOMMENDATIONS OF THE OMBUDSMAN REGARDING POLICY, ADMINISTRATION AND LEGISLATION

Proposals: An Ombudsman, by reason of his position, would come into possession of information which might suggest improvement in the policies, procedures or administration of the Pension Commission. He should have the responsibility to recommend changes in these areas under one of two alternatives explained below:

- (a) Informal proposal: The Ombudsman should be expected to have informal discussions with the Chairman of the Pension Commission in a great many matters including that of proposals for improvement in policies, procedures and administration. These recommendations may be made by the Ombudsman to the Chairman in confidence, and should be made the subject only of a confidential discussion.
- (b) Formal proposal: The Ombudsman should be empowered to make a formal proposal to the Chairman of the Commission, set out in an official memorandum citing the problem, giving his recommendations and the reasons therefor. Where the Ombudsman makes an official proposal to the Chairman of the Commission, and that proposal is not acted upon, the Ombudsman may, if he desires, report the matter to the Minister.

Legislative Changes: The Ombudsman should be empowered to make recommendations to the Minister concerning amendments in the legislation. They should be made in the form of a submission, citing the historical background, the proposed remedy and the reasons therefor.

VIII. GENERAL PRINCIPLES

Full Disclosure: The success of the Ombudsman's office would, in a large measure, be dependent upon his being able to analyze an appeal or complaint with a minimum of formality and delay. Obviously he must have complete access to all files and records in possession of the Commission or the Department. Furthermore, he must have full authority to discuss the case freely with members of the Commission and the staff. If necessary, he should be able to obtain verbal explanations from medical advisers and from the members of the Commission who adjudicated upon a case at all prior stages.

It is important that he be able to engage in frank and exhaustive discussion with the Chairman of the Commission. In this way he may be able to satisfy himself that a correct decision has been reached, or, alternatively, he may obtain sufficient information to justify a request for reconsideration by the Commission. If this is denied, he should have available the necessary information to enable him to prepare a report to the Minister. The close co-operation between the Ombudsman and the Chairman of the Commission cannot be over-stressed. The Ombudsman must have the co-operation also of the Commission and the Department of Veterans Affairs in the discharge of the duties of his office.

Spirit and Intent and Benefit of Doubt: The spirit and intent of the Pension Act, and benefit of the doubt, as it applies to adjudication, are questions which are difficult of definition. The Committee has attempted, in the main report, to set out the spirit and intent, and to establish a basis more realistic than before for application of the benefit of the doubt. It is the impression of this member that an Ombudsman would be able to exercise an effective influence on the administration of the Pension Act in respect of these guidelines. Firstly, as has been explained elsewhere in this Minority Report, an Ombudsman would be able to deal with a great many matters in addition to appeals from decisions of the Commission in regard to entitlement or other benefits. Secondly, an Ombudsman acting in the finest traditions of this type of office could, through his own personality, instil an atmosphere which would ensure for the ex-serviceman the implementation of the Pension Act in a manner commensurate with the status as represented by his service to the state and the assessment of same by the Canadian public.

In the view of this member, the service which could be performed by an Ombudsman in giving effect to the spirit and intent of the Act and the benefit of the doubt would apply equally to administrative deficiencies as to pension applications. The danger of the administrators becoming indifferent or adopting an attitude of self-appraised perfection is always a possibility in any pension scheme. The difficulty is firstly to detect, and then to remedy these administrative weaknesses. The establishment of the position of Ombudsman would make available to the veteran an office with whom he could register complaints, and even suggestions. It would provide also an impartial means through which these complaints and suggestions could be investigated and brought to the attention of the Commission or alternatively, of the Minister.

It may be argued that the provision of a special channel to which the veteran has easy access would encourage excessive complaints and frivolous suggestions. If so, this is one of the penalties which, on reflection, arises from warfare. This is particularly true in a country such as Canada which, as already stated, has raised its forces mainly through voluntary enlistment. If, by reason of such service, there is a possibility that a member of the forces has become disabled or lost his life, the country owes to that member or his dependents a most generous measure of consideration in the matter of compensation for the loss.

For these reasons the ex-servicemen of Canada have every right to expect that their pension law will be administered by officials who are prepared to apply a sympathetic understanding to the discharge of their duties. In many instances an application for a pension is an emotional matter for the applicant and it is not without just reason that the legislators, as early as 1930, found it necessary to insist that adjudication of pensions in Canada be covered by a clause to be known as "Benefit of the Doubt". Through usage, this clause came to mean that

the veteran or his dependent could expect something more than ordinary consideration. The necessity for this principle is even more evident today, and this member feels that if and when assistance is needed from outside the Commission, that assistance can be provided more effectively by an Ombudsman than in any other way.

Public Opinion: The administration of pension law is, of necessity, a difficult and sometimes controversial matter. The administrators must attempt to provide the maximum benefit which the law allows. On the other hand, they have a duty to the state to ensure that benefits are awarded within the terms laid down by Parliament. The Pension Commission must attempt to handle this dual responsibility in a manner which satisfies all concerned - a most difficult task. The Commission has been the subject of both praise and censure and there is no evidence, so far as this member is aware, to indicate that it has been accorded a larger share of one than the other. In the final analysis, the test would have to be whether its administration as a whole has been satisfactory.

The viewpoint of Members of Parliament regarding the Pension Commission is of vital interest, but, because of the necessity to represent their constituents, they might be inclined to be overly critical. Also, the attitude of Parliamentarians might divide along party lines. In the same manner, the views of veterans organizations, although most useful, might tend to favour the unsuccessful applicant.

Summarizing, it can be said that if a sound public opinion is to be moulded in regard to the administration of the Act, information should be constantly provided by an impartial agency.

It is in this area that the Ombudsman could serve a most useful purpose. Assuming that he is a man of uncolored judgement and undeniable stature, the public will come to accept the view that his approach to the Pension Act is impartial, fearless and straightforward. Herein, also, would lie the strength of his office. If he were to find that the Pension Act was being administered satisfactorily, he would be required to say so. If, on the other hand, his public reports indicated dissatisfaction, and spelled out justifiable reasons therefor, the public would have a sound basis upon which to judge the merits of both the administration and the legislation itself.

A large measure of the power of an Ombudsman would lie in his ability to make public his reports concerning the administration of the Pension Act. These reports would presumably be studied by the Veterans Affairs Committee of the House of Commons, and by other legislators. They would be available also to veterans organizations, and, if critical of the operation of the Commission, they could form the basis of representations designed to bring about improvement.

These representations for improvement would in all probability be made in a receptive climate if the public had been conditioned, by reading the Ombudsman's reports, to the fact that there were areas of complaint in the administration of the Act. On the other hand, if the Ombudsman's reports were favourable to the Pension Commission they would serve to acquaint the public with the fact that it was performing in a satisfactory manner.

The right of the Ombudsman to bring his opinion on cases and complaints to the attention of the public would permit him to marshal opinion behind him in his efforts to reach the objectives of his office.

On this point Ulf Lundvik, the former Deputy Ombudsman for Civil Affairs in Sweden, has stated:⁹

"For the proper functioning of the Ombudsman's system a considerable amount of publicity seems indispensable. The Ombudsman's decisions on questions of principle would lose most of their importance if they were not brought to the attention of all those officials who may have to deal with similar questions. Furthermore, no Ombudsman would be able to discharge his duties effectively without the confidence of the people, and in order to gain that confidence he must exercise his activity openly and not withhold his decisions from the scrutiny of the public."

The Parliamentary Commissioner in New Zealand has the power of recommendation only but his authority to make public reports gives his office a potent means of looking after the interests of the private citizen.

In this respect, Mr. J.F. Northey, Professor of Public Law at the University of Auckland, New Zealand has reported:¹⁰

"It was said of a Bill introduced in 1961 that if the Commissioner were authorized to make only one report to Parliament each year, he would be unable, in the period between reports, and especially while Parliament is in recess, to have his criticisms ventilated in the press. But a new provision was incorporated in the second Bill enabling the House of Representatives to authorize the publication of reports of the Commissioner's investigations, even though they had not yet been presented to Parliament; and under rules adopted by the house in 1962, the Commissioner was given this authorization. His reports are expected to state the grounds for his conclusions unless these would prejudice security, defence, international relations or the investigation or detection of crime."

It has been said by way of criticism that these modest powers will render the Commissioner impotent, but the Scandinavian experience does not bear this out. Provided the Commissioner possesses the necessary qualities of judgement and tact, it will almost certainly be found that the wide administrative experience gained in his office will result in his advice being accepted. It must also be remembered that few officials are likely to relish the task of defending before their Minister - or he before Parliament - decisions which appear to be unfair or arbitrary."

It is essential, in establishing the ground rules for publicity regarding his actions, that the Ombudsman decide whether, and if so, in what manner, he should inform the public about any action he takes in a case. This is essential, particularly in pension work, as an Ombudsman must reserve unto himself the right to keep confidential any information which could be injurious to the health or well being of an applicant or complainant.

In this recommendation, the Ombudsman's powers would include the making of a referral to the Minister, in a public report, concerning any course of action which he considers to be unsatisfactory. It is therefore evident that, in a large measure, the powers of his office be exercised through his influence on the public which, if sufficiently impressed with the validity of his complaint, would strongly support a demand for a change in attitude on the part of the administrators or alternatively an amendment to the law. This may not necessarily result in a favourable decision in any specific case, except that, with sufficient public opinion behind him, the applicant could apply for leave to re-open and presumably such leave would be granted. Perhaps more important would be the overall effect if the Ombudsman finds that he has to report unfavourably on a significant number of actions by or on behalf of the Commission. It should be noted that, in the suggested procedure for preparation

of his reports, the Ombudsman is required to give due prominence to the reasons for any action taken by the Commission, so that both sides of an issue would be presented. Provision has been made under the recommendation regarding staff, for the Ombudsman to have professional assistance available in the matter of public relations.

Reports by Ombudsman: In the preparation of public reports to the Minister, the Ombudsman must have the right to express his opinion in all matters which come within his province. He could call attention to the fact that an error had been made or negligence shown by an administrative official. If he came to the conclusion that a decision was improper or unlawful, or clearly unreasonable, he could say so.

He should be required to submit to the Minister, where the situation appears to warrant it, an individual report on a case and all such reports should be made public in a quarterly report. In the preparation of his report the Ombudsman should be required to state the issues involved, a summary of the evidence, a summary of the statement filed by the Commission in defence of its action, and his own reasoning and conclusions as to why some other action should have been taken. In the preparation of this report the Ombudsman should endeavour to ensure that no injustice is done to public officials and he should have the right to report to the Minister in a private manner, where necessary.

The Ombudsman should not make identification of any individual person, whether an applicant, a complainant or a public official. All cases should be identified by a code number and the greatest possible care exercised to avoid identification of individuals involved in the case.

The Ombudsman's quarterly report should be printed and given to the Minister who will lay the report before Parliament as soon as practicable. In addition the Ombudsman's office should arrange simultaneous distribution to the press, veterans organizations and other interested parties. If Parliament is not in session, the Ombudsman should have the right to make the report available publicly without waiting for it to be tabled in the House of Commons.

Protection of Civil Servants: Another reason in support of the appointment of an Ombudsman is that he could serve the purpose of protecting a civil servant from abuse where a complaint was adjudged to be either invalid or unjustifiable. In fact, in those countries where an Ombudsman has been in operation for some time, no objection is found to his operations by organizations representing the civil servants. In explaining the background of the appointment of an Ombudsman in Norway, Audvar Os., the Assistant Attorney General of Norway, stated: ¹¹

"On the other hand, the proposal was strongly supported by the National Associations of Commerce and Industry, and by the Bar Association. And - what is more remarkable - the unions of civil servants had no objection. In Denmark the proposal met rather strong opposition from the civil servants. To avoid the same reaction in Norway the Commission took great care to stress that the Ombudsman would not be the 'people's prosecutor' as against the officials. The activity of the Ombudsman was not intended to be directed against the administration. Instead, in dealing with the complaints submitted to him he would act as a neutral and impartial organ."

Protection of Rights of The Commission and Staff: The Ombudsman must ensure that no action on his part is prejudicial to the Commission, its staff or any persons performing functions for the Commission, except through the issuance of comments or reports as appear justified in accordance with the circumstances of a case or complaint under investigation by the Ombudsman.

The Chairman, acting on behalf of the Commission, or any individual may file with the Minister a rebuttal to any report made to him by the Ombudsman, and the Minister shall make this report public, if he deems such action to be in the best interests of all concerned.

Relationship with Members of Parliament: It has been a traditional responsibility of Members of Parliament to refer cases involving unsuccessful pension claims to the Minister of Veterans Affairs. This member does not visualize that the appointment of an Ombudsman would in any way diminish the rights and functions of Members of Parliament in this respect. If the Member forwards a case to the Minister, he could ask that the Ombudsman investigate the circumstances. Alternatively, the Member could refer the case directly to the Ombudsman in the same manner as any other party who has a legitimate interest in the case.

Relationship with Pension Commission: The position could be taken that an Ombudsman would have an adversary effect upon the operation of the Commission and that, Commissioners and the Commission staff, as civil servants, would not be able to do their work properly with the threat of an outside investigation always present. In reply, this member urges that the work of the Ombudsman and the Chairman of the Commission should be corollary, the one to the other, in that the two offices could function side by side in a satisfactory and harmonious manner. There are several aspects in the institution of an Ombudsman and its effect on civil servants which should be given thought. In the first place, an Ombudsman could present a valuable and impartial defence against unjustified attacks on a civil servant. Secondly, if the civil servants (in this case the Pension Commission and its staff) are required to administer legislation which appears to them to be unjust or unfair, the Ombudsman can call

the attention of Parliament to the necessity for amendment.

Volume of Cases and Complaints: There is no way in which this member could make an accurate assessment, at this time, concerning the possible volume of applications and complaints requiring investigation by the Pension Ombudsman. This would, of course, depend upon the degree of acceptance by veterans and those interested in veterans problems of the institution of an Ombudsman. It would in addition, depend to some extent upon the success or otherwise of the Ombudsman's performance. It is suggested, however, that should the idea be accepted in principle, it would be advisable, in securing authority for the appointment of an Ombudsman and his staff, together with such administrative and office services as may be required, to make provision on a month-to-month basis for supplementary staff, should the need arise. This stipulation is recommended because of the possibility that, during the early months of his operation, the Ombudsman might be swamped with complaints requiring investigation. Every facility should be provided to enable the Ombudsman to perform efficient service, particularly if there should be congestion in his office.

IX. RELATIONSHIP WITH PENSION ACT

The Committee has made no recommendation concerning Section 5(1) of the Pension Act which reads as follows:

5(1) Subject to the provisions of this Act and of any regulations, the Commission has full and unrestricted power and authority and exclusive jurisdiction to deal with and adjudicate upon all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension under this Act and to the recovery or any overpayment that may have been made; and effect shall be given by the Department and the Comptroller of the Treasury to the decisions of the Commission.

If this Section is left in the Act, it would mean that the Pension Commission would have the final authority concerning disposal of pension applications, within the interpretation of the legislation. The appointment of an Ombudsman would not interfere with the concept of autonomy of the Commission. It is this member's view, however, that the establishment of the office of Ombudsman would represent a system of checks and balances which could prevent the continuation or development of bureaucratic tendencies within the Commission, such as may arise in an administrative board or tribunal from which there is no appeal.

Consideration regarding the appointment of an Ombudsman for the Pension Act may lead to the question of whether such appointment would conflict with the doctrine of ministerial responsibility. In reply to this question one should firstly point to the office of the Auditor General of Canada. This official has responsibility and authority to investigate the expenditure of public monies by the Pension Commission. He reports direct to Parliament. Secondly, the Minister of Veterans Affairs has no direct responsibility to deal with or adjudicate upon matters coming within the Pension Act. That responsibility comes within the sole jurisdiction of the Commission in accordance with Section 5(1) of the Act. Therefore, ministerial responsibility is not involved in the administration of the Pension Act, including the possible activity of an Ombudsman.

However, as has been suggested elsewhere in this report, if after a trial experiment it is determined that the office of the Ombudsman is not furnishing a satisfactory remedy to the requirement of an appellate procedure, and a remedy has not resulted in eliminating justifiable present complaints, it may be necessary to confer powers upon

the Minister of Veterans Affairs with the assistance of the Ombudsman, in regard to the final determination of applications under the Pension Act. Should this come about, this member would see the Ombudsman continuing in his role as set out herein with the added responsibility of advising the Minister in regard to the powers vested in him. The Ombudsman would, in effect, be acting both as an agent and adviser to the Minister carrying out his added functions in respect of the Pension Act.

If powers of final decision are given the Minister, it should be made clear that he could exercise such powers only in a case which had been investigated by the Ombudsman, and where the Ombudsman had recommended ministerial intervention.

This member is aware of the necessity to ensure that the granting of pensions must in no way be subject to political influence. It is probably for this reason that the Pension Commission has been allowed the wide measure of autonomy given it under Section 5(1) of the Act, which provides that the Commission "has full and unrestricted power and authority and exclusive jurisdiction to deal with and adjudicate upon on all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension under this Act."

This member is not at all certain that this measure of independence is required; or that it is necessarily in the best interests of all concerned to have a pension administration which is completely independent of the Minister of Veterans Affairs.

Admittedly, care must be taken to ensure that neither the Government, nor its Ministers, can exert direct control upon the Commission in its day-to-day administration of pensions. The question is posed, however, as to whether it is altogether wise to have the Commission completely

divorced from the responsible Minister, as this could ostensibly lead to a situation where the Commission could develop an attitude of disregard for the wishes of Parliament and, more particularly, for the rights of the individual.

This member is of the firm view that, although the Commission should be allowed a certain measure of independence, the responsible Minister could be vested with final authority for the adjudication of pension awards where an independent investigation has been made by the Ombudsman, and where he is prepared to recommend that an award be made within the intent and purpose of the Act.

It is possibly true that up to the present time too much emphasis has been placed in the Canadian Pension legislation, on the necessity of Commission independence. This member considers that the best procedure would be one which provides the necessary balance between the legislative branch (represented by the responsible Minister) and the pension administration. This balance would remove any tendency on the part of the Commission to ignore the views of Parliament, veterans' organizations, or the public at large. It would, at the same time, leave the Commission in the position where it could satisfactorily resist any undue pressure to grant pensions merely on the basis of political or other influence.

It is desired to stress that the proposal being advanced herein (i.e. that final powers to award pension might be given to the Minister if an Ombudsman acting without such power fails) does not mean that the power to grant pensions would rest in the hands of the responsible Minister, per se. The basic difference between this proposal and one which would give outright power to the Minister, lies in the requirement herein that a pension could be granted on ministerial authority, only where a favourable recommendation from the Ombudsman had been made. This proposal would

represent sufficient safeguard against undue influence, so long as the Ombudsman is a capable person who can act in an independent manner. It should be noted, in this respect, that his appointment would be made on a non-political basis and that he could be removed for cause, but only through a majority vote of Parliament.

If, after a trial period, it is considered necessary to confer powers upon the Minister in regard to the final determination of applications under the Pension Act, the Ombudsman would in addition to his added responsibility of advising the Minister, continue to act in a voluntary capacity. He would seek to arouse public opinion in support of his contentions and, only as a last resort would he recommend that the conferred powers be exercised. Human nature being what it is, it should be remembered that the existence of the right to have such powers conferred would, in itself, have a salutary effect upon the Commission.

The difference between an appeal body and the institution of Ombudsman may be summarized as follows:

The former is an organization exercising appellate powers with the usual restriction placed upon an appeal body confining it to the subject matter of the appeal. If its powers are wider or if it has the power to institute investigation there is the danger that it may become a super-Commission.

An Ombudsman advises, investigates, co-operates, wields influence, but has not the power of reversing decisions of the Commission or overruling it in any other way. If, in course of time it is found that the exercise of those functions by the Ombudsman does not effect the improvement sought then powers should be given to the Minister of Veterans Affairs to exercise the needed powers but subject

to the proviso that he is to exercise those powers upon the advice and recommendation of the Ombudsman.

X. BACKGROUND TO REQUIRED LEGISLATION

Rather than draft legislation, this member is submitting the following as a background to whatever legislation is required for the introduction of the principle of the Ombudsman for the Pension Act.

- (a) Title: A position should be established, under the Minister of Veterans Affairs, known as the Ombudsman for the Pension Act.
- (b) Appointment: The Ombudsman should be appointed by the Governor-in-Council on recommendation from the Minister, following consultation with the Standing Veterans Affairs Committee of the House of Commons. This appointment must be made without reference to political affiliation and solely on the basis of his fitness to perform the duties of his office. He need not necessarily have professional qualifications, but should be a man of stature and should be acceptable as a spokesman for those who will require his services. At the same time, he should be the type of person who would assist and protect personnel employed in the administration of the Pension Act, and who would recognize his responsibility to the public.
- (c) Conditions of Employment: The salary should be on a level above that of the Chairman of the Canadian Pension Commission. The Act should provide for his retirement at the age of 75. He may be removed for cause, by majority vote of Parliament. In all other respects, including pension and sick leave, he should be subject to the Civil Service Act.

- (d) Filling of Vacancy: Should it become necessary to appoint an Ombudsman, or fill a vacancy when an Ombudsman dies, retires or resigns or is removed from office while Parliament is not in session, the Governor-in-Council may appoint an Ombudsman on the recommendation of the Minister of Veterans Affairs who shall hold office until an appointment has been recommended by Resolution of the Standing Veterans Affairs Committee of the House of Commons at the following session of Parliament and acted upon.
- (e) Investigation of Grievances: The Ombudsman may investigate any application for any benefit under the Pension Act, or any complaint made to him in regard to the administration of the Pension Act.
- (f) Referrals on Own Initiative: Where the Ombudsman, as a result of an examination of a policy or procedure of the Commission, is of the opinion that the matter should be brought to the attention of the Commission, he may do so in any manner he sees fit. Such information may come to his attention by way of a petition from an aggrieved person, from a complaint registered by any person or organization who may have an interest therein, or from inspections carried out by the Ombudsman.
- (g) Who May Petition: The Ombudsman may receive requests to investigate applications or complaints from the aggrieved person or from any organization or person who may reasonably be said to represent the aggrieved person. Where a request is submitted by an organization or person representing it, the request must be made with the knowledge of the aggrieved person as indicated by his or her signature on the request form.

In addition, any party who may feel that he has a genuine interest in a matter coming within the Pension Act may bring it, in the form of a complaint, to the attention of the Ombudsman. The complaint must be signed and the complainant properly identified. Under no circumstances should the Ombudsman be required to pursue a complaint submitted anonymously.

- (h) Refusal to Investigate: The Ombudsman, in his discretion, may refuse to investigate, or may cease to investigate any grievance if he considers that:
 - (a) It is groundless in that a remedy already exists.
 - (b) It is trivial or is not made in good faith; or
 - (c) The pursuit of the investigation would not be in the public interest or in the best interests of the person aggrieved.
- (i) Notice of Refusal: Where the Ombudsman decides he cannot investigate a grievance, or has ceased to investigate, he would be required to inform the aggrieved person and other interested person or organization. He should be required, also, to reveal his reasons in the advice, subject to the appropriateness of the situation and the necessity to protect the interests of both the aggrieved person and the public.
- (j) Privacy of the Investigation: The activities of the Ombudsman, in carrying out an investigation of a grievance, should not be a public matter and his records, minutes and correspondence should not be the subject of public disclosure.
- (k) Referral to Commission: The Ombudsman may refer the grievance to the Commission, either in an informal manner or through a formal procedure.

- (1) Action by the Commission on an Application: The Chairman of the Pension Commission may take action on a referral from the Ombudsman as follows:

Entitlement Applications

- (a) He may direct that leave to re-open be granted.
- (b) He may direct that the Ombudsman's referral be placed before an appropriate board to consider leave to re-open, or
- (c) He may investigate the application personally.

Discretionary Applications

- (a) He may arrange for re-consideration by a quorum of the Commission;
- (b) He may arrange for a personal appearance of the applicant before one or more Commissioners under the authority of Section 7(3) of the Act; or
- (c) He may investigate the application personally.

Complaints

- (a) He may investigate the matter personally.

Following a review of the application or complaint, the Chairman of the Commission will advise the Ombudsman as to the action taken.

- (m) Ombudsman's Report: Where the Ombudsman has made a formal referral to the Commission, he will determine, by a review of the file or any other method he deems advisable, the course of action taken by the Commission and he may, in his discretion, prepare a report on the matter. These reports would normally be made under two categories as follows:

Category A - Agreement with the Canadian Pension Commission

Category B - Disagreement with the Canadian Pension Commission

Such reports will outline the grievances investigated, cite the issues, provide a resume of the evidence, the conclusions drawn, and the reasons therefor. The Ombudsman should be required also to prepare a "letter of advice" to the applicant or complainant, with copies to those who represented him.

Where the Ombudsman has conducted an investigation by way of informal referral to the Commission, he would not normally prepare a report, although he may do so in his discretion.

In such case, he would be required to prepare the usual "letter of advice" to the applicant or complainant, with copies to those who represented him.

(n) Distribution of Reports: The Ombudsman's reports on his investigation will be made to the Minister of Veterans Affairs. These reports will be published quarterly with distribution to members of the Standing Veterans Affairs Committee of the House of Commons, to recognized veterans organizations and to the Parliamentary Press Gallery. Copies may be issued, on an individual basis, to other interested parties at the discretion of the Ombudsman.

(o) Annual Report: The Ombudsman shall make a general annual report to the Minister of Veterans Affairs, and this report will be included in the Minister's Report of the activities of his Department.

(p) Access: The Ombudsman shall have full access to all papers and records of the Commission, the Departments of Veterans Affairs, and National Defence, (the latter subject to security clearance) and shall be given permission to confer in confidence

with any official of the Canadian Pension Commission or the Departments of Veterans Affairs or National Defence, at his discretion. This will apply, as well, to members of the Ombudsman's staff on designation.

- (q) Staff: Subject to financial appropriations the senior staff members in the office of the Ombudsman, will be appointed by the Governor-in-Council, on recommendation of the Ombudsman. Clerical personnel required to carry on work of the Ombudsman will be provided through the Department of Veterans Affairs.
- (r) Accommodation: The Ombudsman and his office staff will be quartered with the Department of Veterans Affairs. He and his staff should be attached to the Department for purposes of accommodation and other administrative requirements. He should have no other connection with the Deputy Minister of Veterans Affairs.
- (s) Oath of Office: The Ombudsman shall take an oath that he will faithfully and impartially perform the duties of his office and he shall be commissioned by the Government for this purpose.
- (t) Delegation of Authority: The Ombudsman should be empowered to administer an Oath of Office to any person holding office under him. The Ombudsman may from time to time, by writing over his signature, delegate the authority he has under the Act for a specified period of time except the power of delegation. Normally such delegation of the powers of the Ombudsman will be made only when he is absent from duty. In the event that circumstances create the requirement for a delegation of the duty of Ombudsman to a member of his staff and the Ombudsman is not available to authorize the delegation, such may be done by

the Minister of Veterans Affairs, subject to cancellation if and when the Ombudsman again becomes available.

- (u) Privileges of Office: The Ombudsman should be able to carry out the duties and functions of his office with the same legal protection as that afforded to Commissioners under the Enquiries Act. This will apply, as well, to members of the Ombudsman's staff and his designation. He will not, except for the purpose of giving effect to his office, divulge any information received by him in the course of his duties. No proceedings, civil or criminal, should lie against the Ombudsman or any person holding any office or appointment under the Ombudsman for anything he may do, or report, or say in the course or exercise or intended exercise of his functions under this Act, unless it is shown that he acted in bad faith. The Ombudsman and any such person as aforesaid, should not be called to give evidence in any court or proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of his duties. Anything said or any information supplied or any document, paper or thing produced by any person in the course of an enquiry, by or proceedings before the Ombudsman under this Act should be privileged in the same manner as if the enquiry or proceedings were in a court. Any report made by the Ombudsman under this Act should be deemed as an official report made by a person required by his office to do so.

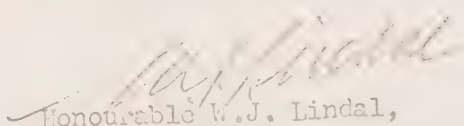
- (v) Hearings: The Ombudsman should have authority to conduct a hearing under the Enquiries Act. The Ombudsman should have the power to compel the attendance by subpoena if necessary, and examine under oath, any person who is an officer or employee of the Canadian Pension Commission, the Department of Veterans Affairs or the Department of National Defence.
- (w) Recommendations to the Commission: The Ombudsman should be required to suggest remedies to the Commission where he considers that improvement is required in procedures, administration or policy. These should be made either in an informal proposal or in a formal presentation citing the problem and recommendations and the reasons therefor.
- (x) Legislative Changes: The Ombudsman should be empowered to make recommendations to the Minister concerning amendments in legislation. These should be made in the form of a submission, citing the historical background, the proposed remedy and the reasons therefor.
- (y) Outside Expert Opinions: The Ombudsman must be empowered to expend public funds to obtain expert opinions from sources outside of the Canadian Pension Commission and the Department of Veterans Affairs. He should be accorded the same access as any other Government officer to opinions from officials employed by the Federal Government, without charge. Should he require an opinion from sources outside the Federal Government, he should be empowered to expend public funds for this purpose.

(z) Procedural Rights Within the Commission: The Ombudsman shall be required to determine, upon receipt of an application, as to whether the applicant has exhausted his procedural rights within the Commission. If he has not, the Ombudsman shall inform him accordingly and the Ombudsman may not investigate such case further until the applicant has exhausted his rights. In a case of entitlement, this would involve a hearing by or for the proposed Entitlement Board, followed by denial of application for leave to re-open. In the case of discretionary benefits it would involve a denial of the request following a personal appearance under Section 7(3). The Ombudsman must exercise due care that he does not interfere in an application while such is before the Commission.

XI. CONCLUSION

The Committee approved an arrangement detailed in the Minutes of the 20th Meeting to the effect that this member would have available to him the services of Mr. H.C. Chadderton, the Committee Secretary. This member wishes to acknowledge the able assistance of Mr. Chadderton whose wide knowledge of pension matters and government administration has been invaluable in the preparation of this Minority Report. Appreciation is due also to the other members of the Committee staff.

Dated in Ottawa, Canada, this 29th day of June, 1967.


Honourable W.J. Lindal,
Member of the Committee to Survey the work
and Organization of the Canadian Pension
Commission.

MINORITY REPORTREFERENCES

1. "Administration Law", by H.W.R. Wade, page 196.
2. "Administration Law", by J.F. Garner, LL.M., page 160.
3. Revised Danish Constitution of 1950, Section 55.
4. "The Ombudsman", by Donald C. Rowatt, University of Toronto Press, page 62.
5. Ibid, page 133.
6. Ibid, page 98.
7. Swedish Constitution, Article 22, 96-101.
8. "The Ombudsman", by Donald C. Rowat, University of Toronto Press, page 120.
9. Ibid, page 50.
10. Ibid, page 137.
11. Ibid, page 96.

SUPPLEMENTARY COMMENT

MEMORANDUM BY MR. JUSTICE MERVYN WOODS AND COL. G.A.M. NANTEL ON THE FUNCTION OF A PENSION OMBUDSMAN, AS PROPOSED IN THE MINORITY REPORT PREPARED BY THE HONOURABLE WALTER J. LINDAL, Q.C.

One of the most important aspects of this enquiry was the procedure for appeal in regard to applications under the Pension Act. Representations made to your Committee indicated considerable dissatisfaction with the existing provision under which Appeal Boards, composed of three Commissioners, dealt with entitlement claims where the applicant had been refused pension on the basis of initial and succeeding reviews of a documentary nature by quorums of the Commission.

Your Committee Chairman and Col. Nantel, herein referred to as the majority members, have proposed an appellate procedure in the nature of a Pension Appeal Board, as set out in the recommendations in Chapter 4 hereof. Judge Lindal has filed a Minority Report proposing the institution of a Pension Ombudsman.

The majority members of your Committee consider that the recommendation regarding a Pension Appeal Board is self-explanatory, and requires no further supporting comment. We do wish, however, to record our views regarding the proposed Pension Ombudsman.

There are certain general observations which might be made on the function of the Ombudsman. It is a subject now much discussed in Canada, but it appears fair to say that the nature of the operations of an official of this type is still not clearly understood.

Alfred Penellun, the Swedish Ombudsman, stated in an address in Toronto, Ontario, on June 14, 1967: *

* As reported in the Financial Post of June 24, 1967.

Supplementary Comment

The advantages of an Ombudsman must not be exaggerated. His contribution to good government for natural reasons cannot be more than a rather limited one. He can take samples here and there, but not closely control the whole area of public administration. On the contrary he must concentrate on a few projects of improvement of government.

An institution of an Ombudsman is no cure-all and the Ombudsman must not be looked upon as an oracle ready to give answers on all questions and solve all problems.

From the quotation given it seems clear that, in the opinion of the Swedish Ombudsman, a person holding this appointment cannot and should not be involved in the detailed administration of one aspect of governmental activities.

The following observations can be made on the role of an Ombudsman.

1. He appears to be a special kind of investigator or people's advocate ranging over the whole area of Government administration.
2. It appears that his proper role is to focus his attention on separate and outstanding cases presented to him, leading either to rectification of injustices or changes in legislation and policy. These results occur not because the Ombudsman has any power to do anything but rather because of the force of his investigative efforts or his persuasive powers.

With the help of the publicity given to his reports, the various agencies of the Government alter previous decisions or policies in some but not all cases.

Supplementary Comment

Proceeding from these general observations to the Minority Report, the following comments are made thereon:

No matter how the terms of reference and the role of the Pension Ombudsman are defined, he would become a single purpose official whose only function would be to deal with pensions. Regardless of what may be said about the exceptional power of his office and the informality of his proceedings, it seems evident that in a reasonably short time his activities would become part and parcel of the total pension administration. They would thus become subject to the same strictures as the appellate tribunal. Inevitably there would have to be formalization of proceedings in an attempt to achieve consistent treatment and all the other necessary characteristics of an on-going and continuous administrative process.

It seems apparent that the major defect in the Ombudsman's role in pension administration would be that he could himself do nothing to alter or rectify decisions. From this standpoint the substitution of an Ombudsman for a proper appellate tribunal represents an imperfect and inadequate answer to the problems your Committee has considered.

It is clear that the main role contemplated by the Ombudsman is that in one way or another he would use his powers and influence to have the Pension Commission review a decision which it has already made.

Supplementary Comment

It appears to be assumed that the Ombudsman, by virtue of his high office and the publicity attached to his activities, would be able to influence the Commission in many cases to reverse decisions where it might not have done so under the present appellate procedures it employs.

A number of observations can be made on this point as follows:

1. It seems reasonable to say that only in the most unusual and extraordinary cases would the force of the Ombudsman's position and publicity be of any consequence in obtaining a reversal of previous decisions.
2. One of the most serious and telling complaints against the present system is that the pensioners' right of appeal is limited to the organization which has rejected its plea in the first instance. It is difficult to see how the intervention of the Ombudsman over a period of time would remove the apparent sense of injustice which seems to be created by this situation.

The Minority Report appears to suggest that the procedure of intervention by the Ombudsman is not likely, over a period of time, to result in appreciable alteration of the Pension Commission's decisions or policies. Hence the Report recognizes that the Pension Ombudsman should report to the Minister and proposes that, if an Ombudsman fails, the Minister himself ultimately will have to be clothed with power to reverse or alter Pension Commission decisions or policies on the recommendation of the Ombudsman.

Supplementary Comment

It seems reasonably clear to the majority members of your Committee that unless the special function of the Pension Ombudsman is closely tied in with a ministerial or other power to reverse and alter decisions of the Commission, the present state of unrest will be perpetuated and indeed aggravated. Presumably the creation of an ombudsman will, no matter how carefully his functions are defined, create a high degree of expectation that he can and will do something. If, as the above analysis suggests, his activities produce positive results in only a marginal number of cases the present criticisms of the pension administration will only be increased.

The basic issue which your Committee faced was to establish procedures which are acceptable to those seeking benefits under the Pension Act, and which can be expected to do something effective to help them. There is a large and continuing volume of cases before the Commission, many of which are capable of appeal and review on a variety of grounds. From the standpoint of orderly administration, in the view of the Majority Members it is no answer to this problem to have it dealt with by the irregular interventions of an ombudsman in specific cases. The only effective answer in terms of proper administration is to establish a working procedure whereby all appeals can be properly considered.

It seems obvious that the special role of an ombudsman is to deal with situations including those where appeals are not possible and to use his extraordinary powers coupled with the force of public opinion to obtain some kind of reconsideration of unjust decisions. The case for an ombudsman appears less compelling where proper appellate procedures exist.

The Minority Report refers to the unsatisfactory experience with previous experiments in Canada with appellate procedures under the Pension Act. These have been fully dealt with in the main Report. The recommendations therein

Supplementary Comment

suggest an appeal procedure which would be structured and operated so that the mistakes of the past will not re-occur.

One final opinion might be made about the operation of the proposed Pension Ombudsman. Considerable stress is placed in the Minority Report on the fact that the Ombudsman would and should conduct his enquiries confidentially. It appears to be assumed that the average pensioner affected by this proceeding would be content to make some kind of a written submission to the Ombudsman which would result in the Ombudsman conducting enquiries confidentially and ultimately making a report based thereon.

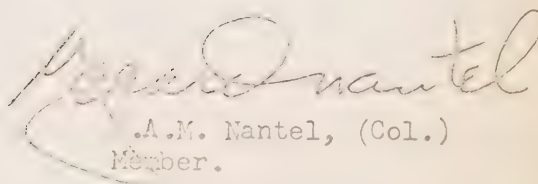
It is the view of the majority members that appellants under the Pension Act, over a period of time, would come to regard the Ombudsman as just another bureaucrat who hears their representations and ultimately renders a decision which may or may not be favourable. This does not meet the major complaint that these proceedings are too frequently held behind closed doors and that the applicant has no proper opportunity of examining for himself the various documents and facts upon which decisions are made. The institution of an Ombudsman would not, in the view of the majority members, meet the requirements of the situation.



Mervyn Woods,
Chairman.

Dated at Ottawa, Ontario

August 25, 1967



A.M. Nantel, (Col.)
Member.

REPORT OF THE COMMITTEE TO
SURVEY THE ORGANIZATION AND WORK OF
THE CANADIAN PENSION COMMISSION

PART FIVE

CONCLUSION

CHAPTER 46

CONCLUSION

This conclusion provides explanation concerning the work of your Committee, together with added comment regarding the Canadian Pension Commission, and some further recommendations and suggestions, largely in respect of administrative matters. Your Committee's acknowledgements are included as well.

1. Time Required

Your Committee appreciates that it was your hope initially that its work would be completed within the space of a few months. This has not been possible for a number of reasons.

To begin with the members of the Committee were not all appointed until well into December of 1965. This we understand was attributable to the fact that, after accepting appointment, one nominee withdrew because of a change in employment. It took some weeks to find a replacement. In the meantime, the other two Committee members proceeded to secure a secretary. Staff and office facilities were arranged for, and advertisements were published inviting representations. As a result, the earliest that hearings could be held was January of 1966.

While everyone appearing was most co-operative, there were delays due to the necessity of meeting the convenience of many of those who appeared. The members of your Committee have also had to meet the demands of their respective callings and have not been free to devote their full attention to Committee activities. The Chairman has endeavoured to carry his full share of the work

Conclusion

of his court in Saskatchewan. His absences to attend to the work of your Committee have been made possible through the cooperation of his colleagues on that court. While Judge Lindal is retired from the bench, he is a man of diverse activities and responsibilities. These on occasion have required attendance elsewhere. Colonel Nantel has continued to carry out his duties with the Judge Advocate General Branch of the Canadian Forces in the Province of Quebec and, since the establishment of your Committee, has experienced two moves and one change of command.

Apart from reasons arising from personal circumstances there are other reasons for delay. Noteworthy among these is the extent of the response to the advertisements inviting submissions. These greatly exceeded our expectations. The extent of our task was increased by the fact that it was necessary to secure and co-ordinate a lot of information. This was not available in one place and, in effect, had to be ferreted out from various sources as the hearings progressed. This took time as well. If you add to this the inconvenience of distance that all national committees in a country as vast as Canada must accept, the time problem of your Committee will be appreciated.

2. Survey Overdue

It is apparent to your Committee that the present review is long overdue. The operations of the Pension Commission are extensive, complex and unique. Those administering it are given extensive responsibility and power. Their task is exacting and fraught with a multiplicity of problems. They disburse large sums of money.

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On their decisions rest not only the legal rights, but in large measure, the well-being of thousands of our citizens. In the course of administration patterns form and methods are evolved. There is an understandable tendency to let sleeping dogs lie. There is also a propensity to be satisfied with all that is not criticized. In other words, self-assessment or self-criticism has not been encouraged within the Commission. There is a tendency also to be content with an answer to criticism that satisfies the one giving it. This is sound morally, but it is often not sufficient for good public relations. Add to these the natural propensity for deadwood to accumulate and it is apparent that a fresh look is needed more often than every 30 years.

The Pension Commission is, of course, an arm of the executive of government, clothed with extensive powers and enjoying a large measure of autonomy. Periodically, and on many occasions annually, it has to deal with some of the representations of veterans organizations. This involves explanations of some areas of its activities through you and your department. It goes without saying that the watch dog activities of these organizations are healthy. It is also apparent that they are both expected and welcomed. Sessions of the various parliamentary committees on veterans affairs no doubt have a similar effect. While such reviews help, they cannot be expected to be comprehensive. They cannot fail, however, to arouse a defensive attitude on the part of the Commission. Your Committee appreciates this.

As part of the public service, the Commission may well feel

Conclusion

some reticence in suggesting measures of reform. It is evident that it appreciates that its function is to apply policy as expressed by legislation and not to form it. Your Committee has a full appreciation of this attitude as well.

Some of the matters for which the Commission was criticized should have been apparent to the Chairman and his staff. The disorganized state of directives is one example. In your Committee's view, many of the matters dealt with in this report have in effect just drifted into their present state. The Commission deals with very specialized problems and does this with an organization that is in many ways unique. Over the years it has done a good job. Its Chairman and those who have directed it have built up a good organization that functions well. There are, however, areas in which the Commission could have set its affairs in a better state of order. This of course, is not surprising after more than forty years.

It is true that veterans' organizations and others act as watchdogs on the Commission's activities. This is effective and helpful both to the Commission and these organizations. It is suggested that the long delay between enquiries is not fair to those administering the Act. Any review of the large number of cases handled by the Commission would, your Committee is satisfied, lead to the conclusion that by and large it does excellent work. Since 1933, however, the complexion of life in Canada has changed in many ways. While there were many appearing before your Committee who had words of commendation for the Pension Commission, some of these referred to these changes.

Conclusion

One stated: ¹

In the meantime, it appears to me that the Pension Act -- that is, as it affects those who were on service in the war -- has tended to be rigidly and conservatively interpreted, much as it might have had to be during the depression years, or even in the very early years of World War II. I think that this is reflected if we look over the history of the "benefit of the doubt" clause in the Pension Act.

Another stated: ²

Now, the Pension Commission; first of all they are a responsible body, and I would be the last one to encourage them to carelessly involve the state in years of expenditure on behalf of applicants unless there was a very sound basis for the application, but on the other hand, the opinion of the House of Commons, as I interpret it, is that Parliament wants to do for the disabled veterans, and for dependents of veterans, as much as it possibly can in recognition of their services, and if we reach the stage where the House was objecting to careless procedure on the part of the Pension Commission, careless misuse of public funds, then there would be some reason for the Pension Commission to be extremely cautious in its application of the benefit of the doubt clause, but that is not the case.

Since the inception of the Pension Act and the establishment of the Pension Commission in Canada, we have seen the development of a long list of social benefits. This has to some extent been reflected in the increased benefits in pension matters over the years. However, there was certainly a strong feeling among a number of those who appeared before your Committee that basic Pension Commission thinking and attitude were not attuned to the widening scope of state assistance.

3. Need for Appellate Procedure

The type of proceeding followed in the Commission was new to the members of your Committee, each of whom has had experience in one capacity or another with administrative tribunals. There was,

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however, in all the representations little or no criticism of the form and structure of the tribunal. There was both criticism and suggestion with regard to its composition and some of its procedures. There were many requests for a further right of appeal to a body independent of the Commission. In general the machinery for handling claims was regarded as fair and effective. Your Committee has accordingly no recommendations for the abolition or replacement of any of the major administrators or tribunals which operate as part of the Commission. We do recommend some changes and additions but only a few that would interfere with the day to day operation and procedures of the Commission as constituted at present.

4. Prestige of the Commission

The Canadian Pension Commission, as established by the Pension Act, is seen by your Committee as having the purpose of administering that Act in the interest of veterans, members of the Forces and dependants of both so as to make this legislation effective. In our view this has been and is being accomplished. This is possible not only because of the powers conferred on the Commission by the legislation but also because of the dedication of those responsible for its application at all levels.

Your Committee would not imply that dedication should not be expected in all areas of public service. It is apparent, however, that the fact that the Pension Commission at all levels is staffed where possible by those who have served in the Forces serves to provide a greater measure of understanding than would otherwise be the case.

Conclusion

The pension commissioners do not hold their positions through the Civil Service Commission. This, as is proper, sets them apart and this atmosphere, in one degree or another, permeates the entire staff. Your Committee found among some of the Commissioners a feeling that in some respects they fell into the category of poor relations in the government service. This was not probed extensively by your Committee, but any grounds that may exist to sustain such feelings should be removed. The Canadian Pension Commission is seized with responsibility which reaches to the uttermost ends of the nation and which directly affects the well being and interests of a large but special group of Canadians who are to be found in every part of Canada and even outside its boundaries. The body that administers the Pension Act should have prestige, not only with those it serves but in the eyes of the public service and the nation as a whole.

5. Organization of Commission

There was some suggestion in representations to your Committee that the Commission should be organized more on a regional basis for hearings by its appeal boards. It was also suggested that use be made of local people in the various localities where hearings are held to help man the boards. Your Committee was not impressed with these suggestions and is of the view that present coverage is reasonably adequate. The present system subjects the Commissioners to a great deal of inconvenience through the extensive travelling involved in their itineraries. However, in the view

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of your Committee, it does serve to give more uniformity than any system of a regional nature could give. The present schedule is demanding on the Commissioners. If more frequent hearings are needed at any time the answer should be sought in enlarging the Commission rather than in sub-dividing it. If a temporary increase is needed in the number of Commissioners the appointments could be ad hoc.

6. Comparative Analysis

Your Committee has, along with other Canadians, been proud of the fact that Canadian pension legislation and its administration have given to those who come under it a high standard of care and assistance. At the beginning of its deliberations your Committee shared with many others the view that Canada ranked high in the Western World in showing its gratitude to those who had served in its Forces both in times of national peril and in times of peace. While not now disabused of this view, your Committee was surprised to learn of the number of areas in which other countries had caught up to and even surpassed us. Your Committee's study was not essentially a comparative one so it did not investigate this aspect in depth. Most of the information regarding that which is done elsewhere came piecemeal and in relation to the specific areas the Committee was investigating. However, your Committee passes on the thought that with increased attention to veterans' problems in other countries their standards have been raised and Canada's relative position is probably not so pre-eminent as it once was.

Your Committee has heard the suggestion, from time to time, that Canada's pension program for disability and death arising

Conclusion

from military service is among the most generous of any in the world. Your Committee would not take issue with this appraisal, particularly as, in some vital areas of pension law, it appears to be completely accurate.

There are two prime examples. The first is the "insurance principle" under which pension may be paid for any disability so long as it was incurred on, or aggravated during service, regardless of whether the disability was in any way connected with that service. The second example is the provision under which no deduction is made for a pre-enlistment disability, so long as the member of the Forces served in a theatre of actual war, provided that the disability was not obvious at enlistment, and that there was no record of treatment of the disability prior to enlistment. These provisions do not exist, in this broad form, in the legislation of any other country, in so far as your Committee can determine.

Notwithstanding the acknowledged generosity of these provisions, your Committee considers that the Pension Act in Canada requires considerable broadening in other provisions, as brought out in your Committee's recommendations.

7. Research Facilities

Your Committee staff encountered considerable difficulty in carrying out the research in regard to the historical background of many provisions of the Pension Act. In regard to those provisions dealt with in this Report, the historical development is fully explained herein. There is a need for continuity, and for

Conclusion

more research on other provisions, however; and your Committee suggests that the Commission establish improved facilities for this purpose. This would ensure that the full details concerning the development of all aspects of this pension legislation would be readily available, not only within the Commission and the Department, but to Members of Parliament, veterans organizations and other interested parties.

8. Pension Increases in Discretionary Awards

The basic rate of pension is subject to revision from time to time. This rate is fixed in Schedule "A" of the Pension Act and the basic rate for widows is set out in Schedule "B". The rate for certain of the discretionary areas is also fixed in the Act.

These are:

Attendance Allowance as provided in Section 30(1).

Clothing Allowance as provided in Section 30(2).

Sickness and Burial Expenses as provided in Section 35.

Dependent Parents Pension as set out in Schedule B.

Dependent Brothers and Sisters Pension as set out in Schedule B.

It has been the policy of the Commission to review the awards in the other discretionary areas as soon as practicable, following any general change in the basic rate of pension for statutory awards. Your Committee considers this practice to be fully satisfactory and it would not be feasible to attempt to make statutory provision for awards which must necessarily be made at the discretion of the Commission.

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9. Payment for Medical Opinions and Fees

Your Committee noted the comment from Dr. W.F. Brown, Chief Medical Adviser of the Commission, to the effect that medical experts were prepared to provide opinions to the Commission at a nominal charge or in some instances without payment. This action is commendable, but your Committee seriously questions whether it is a satisfactory practice. It is suggested that the Pension Commission should establish a firm policy regarding payment for specialists' opinions obtained from personnel employed outside of the Canadian Pension Commission or the Department of Veterans Affairs, such payment to be at a reasonable rate, and to be revised from time to time, in accordance with any adjustments which may be necessary in regard to economic conditions.

Your Committee considers, also, that the Commission should review the amounts authorized for payment for expenses of applicants and witnesses appearing before the Commission. These rates must be realistic, and arrangements should be made for their revision from time to time, as necessary.

10. Liaison with Minister's Office

It appeared to your Committee that a necessity could exist to establish a staff advisory facility with your office, in regard to pension matters. Your Committee noted that extensive use is made of the Veterans' Bureau to prepare correspondence for the Minister's office, with the result that, in many instances the Bureau staff was required to explain the reasons why pension could not be granted.

Your Committee considers that this is not a function of the Veterans'

Conclusion

Bureau and that its officers should be, in so far as is possible, independent of both the Commission and Department, leaving its responsibility as that of advocate for the applicant. A full explanation of this is available in the section of this Report dealing with the Veterans' Bureau.

The Pension Commission is free to operate independently of direction or control of the Minister. This traditional arrangement has been the consistent policy of all Governments and all Parliaments since the inception of the Pension Act in 1919. Your Committee desires to emphasize and affirm the importance of this arrangement. It serves to protect the Commission - and the administration of pensions - from political interference or control. Also, it is intended to create an atmosphere of independence and impartiality for the administration of pensions.

Because of this arrangement, which provides an independence from ministerial control for the Commission, your Committee detects a possible breakdown in the manner in which a Minister of Veterans Affairs can receive advice concerning the effectiveness or sufficiency of the provisions of the Pension Act.

In illustration, if a Minister of Veterans Affairs received a representation concerning an amendment, and referred such to the Pension Commission, it might be considered that he was interfering with the autonomy of the Commission. Even if the autonomy question were not at issue, there would still be the possibility that the Commission, if opposed to the matter, could prepare advice for the Minister which could have the effect of nullifying the representation. If the matter in question happened to be of a technical nature, possibly involving some intricate point of pension law, it would not be feasible for the Minister to proceed against the advice of the Commission.

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The role of the Deputy Minister of Veterans Affairs is germane to this issue . The Pension Act states, in Section 3(3), that the Chairman of the Pension Commission shall have the rank of Deputy Head. This places him on equal terms with the Deputy Minister of Veterans Affairs. Hence, the latter should not be in a position to advise the Minister on pension matters, particularly where there is the possibility of conflict with Commission policy.

In summary then, the position seems to be that the Veterans' Bureau should not, in your Committee's view, undertake responsibility other than that of serving as an advocate for the veteran. The Deputy Minister and his departmental staff are not in a position to assist the Minister in regard to policy matters which may be controversial in the view of the Commission. Thirdly, there are ample reasons why the Pension Commission itself must remain autonomous and probably should not be placed in the position of having to advise the Minister in regard to specific complaints against itself, or on legislative matters, particularly where controversy may involve Commission interpretations.

This leaves the problem properly within the Minister's office -- and your Committee recommends therefore that, in order to handle this responsibility, provision should be made for a senior civil servant on the Minister's staff to specialize in pension matters.

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The specifications for this position should probably require the incumbent to have specialized knowledge of the Pension Act. His duties could include that of handling correspondence dealing with the Pension Act, of advising the Minister in regard to parliamentary enquiries, and of keeping the Minister fully informed in regard to Pension administration. This adviser would be able to undertake studies concerning the efficacy of provisions of the Act, at the direction of the Minister.

The appointment, if approved, should be of a permanent nature as its effectiveness would come from having an experienced person available within the office of the Minister who could advise on all matters in respect of the Pension Act.

The suggestion regarding the appointment of an adviser on the Minister's staff to deal with pension matters should be viewed in the light of the position of the Minister in respect of pension matters.

It has to be recognized that in a free democratic society an autonomous commission dealing with important matters touching a wide section of the public cannot operate in a vacuum. Where a member of the public wishes to question a particular decision of the Commission, or its general policies and practices, he naturally will address himself to the Government and more particularly to the Minister through whom the Commission reports to parliament. Both the Government and the Minister are thus put in a position where they cannot fail to respond to such enquiries. Moreover, consistent with their general responsibilities, the Government and the Minister must be considered desirous of assuring that the Commission is functioning in a way which

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is consonant with the general purposes and intent of the Pension Act. It therefore follows that there has to be some liaison between the Office of the Minister and the Commission through which the Minister can be properly advised of the Commission's activities.

Having regard for the general principle of autonomy, the Minister's main concern must be that of keeping himself informed to the extent necessary about the activities of the Commission, without being put in the position where he interferes or appears to interfere with the Commission's work.

Clearly the Department of Veterans' Affairs itself cannot provide a connecting link between the Commission and the Minister. The procedure, heretofore adopted, of using the facilities of the Veterans' Bureau for this purpose is obviously an expedient developed over the years because no other machinery was available. It is unsatisfactory for all reasons heretofore stated in the Report. It has the added disadvantage that it is certainly not the proper role of the Veterans Bureau to make assessments on the general operations and policy of the Commission or recommendations to the Minister as to legislative changes. It therefore follows that the case is clear for the establishment of some special liaison section in the Minister's office.

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11. Role of the Commission in Regard to Legislation

Your Committee has noted a possible reluctance on the part of the Commission to advance suggestions regarding amendments to the legislation. As your Committee understands it, the Commission policy has been that the Act must be accepted as passed by Parliament, and apply it as best it can. Should the Commission encounter difficulties because of the wording of the statute, it has taken the position that it must accept the consequences, and that it is not its proper role to make comment thereupon.

Your Committee has been unable to determine the source or reasons for this apparent policy - and is not aware of whether it is one in which the present Chairman and members of the Commission agree. It is perhaps sufficient for the present to suggest that, if this policy is being followed, serious consideration should be given to relaxation of it. Your Committee visualizes that no useful purpose could be served by a Commission of this nature divorcing itself from the responsibility to advise the Minister or the Government should it detect in its day-to-day operations, what could amount to a demonstrable shortcoming in the legislation it administers.

It appears to your Committee that there are at least two methods by which the Commission could advance proposals, where it was considered that legislation might require amendment. These are:

- (1) where the Commission came to the conclusion, in an individual case, that it was necessary to refuse a pension application because of legislation which, in the view of the Commission, might be too restrictive or might in some other manner require amendment, that particular decision could be forwarded to the Minister, with an appropriate comment from the Commission; and

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(2) in its Annual Report to the Minister, the Commission could, with absolute propriety, call attention to situations which could conceivably require legislative action.

12. Commission Complimented

While the Report is more comprehensive than was initially felt necessary, it is to be noted that the sum total of the complaints is only a portion of the case load and work of the Pension Commission.

A Report such as this concentrates on areas where there is criticism. The Report is by and large critical of the work of the Commission. This is so because there is no need to dwell on areas that are operating to everyone's satisfaction. Your Committee would point out that many compliments were paid to the Commission by those appearing and your Committee believes that these accolades are well merited. In pointing out areas that need attention the fine service that has been and is being performed should not be overlooked. It will be apparent also that in many instances it is not the Commission but the legislation that needs attention.

13. Necessity for full disclosure

Possibly the most serious flaw in the administration of the Pension Act, in the view of your Committee, is the tendency of the Commission to view its operation as one which can best be carried out on the basis of providing only limited public information in regard to its policies and interpretations.

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Throughout this Report, your Committee has observed upon several instances of this. For example, the Commission does not issue directives for publication outside the Commission. It does not as a general rule, attempt to lay down interpretations (presumably on the premise that "to define is to restrict"): The all important area of medical advice from the Commission staff is handled on the basis of a confidential "white slip", a full discussion of which appears in the Chapter dealing with the Medical Advisory Branch. The testimony given at Appeal Boards is not recorded except that of a medical nature, and even then, such is transcribed only if the application fails. Another example: the refusal of pension on the grounds of pre-enlistment disability without the production of evidence upon which the decision is taken. Lastly, the Commission does not, as a general practice, prepare its written decisions in sufficient detail to provide the applicant and those who represent him with a full explanation of the reasons for an adverse decision.

Your Committee does not suggest that this seeming predisposition to operate "sub rosa" has been harmful to the pension applicant. The recommendations in this Report concerning the necessity for full disclosure are made more in the light of an apparent requirement to establish ground rules for the operation of the Commission which would eliminate the possibility of it being criticized. The air of secrecy which appears to have surrounded the administration of this Act should disappear. Directives should be published and should be available to all concerned. Official interpretations of the Commission should be promulgated through medium of these directives. Medical advice from the medical staff should be written in the form of official medical

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precis which are available, and which could be openly challenged by the applicant and those who represent him. All testimony should be recorded. Pension should be refused on the grounds of pre-enlistment origin only where the evidence is produced. Decisions should be written in sufficient length to furnish an explanation of the Commission's reasoning.

The main reason for the long-established policy - still extant - of operating, for the most part, in a private manner is possibly based on tradition. When the Pension Act first came into being in 1919, there was probably justifiable concern among the administrators regarding the possibility of this legislation being turned into a sort of "free for all", encouraged by a high feeling of gratitude on the part of the country for those who had returned triumphant from war, but maimed as a consequence.

So called "pension scandals" were not unheard of in the days immediately following World War I. In the book on this subject entitled "Pensions and the Principles of their Evaluations" published in 1919,* the authors referred to possible abuses in the pension system. They related the history of "the United States Pension Fund", as follows:

United States Pension Fund - in 1899 there were 991,519 pensioners, the annual cost of pensions was \$27, 671, 010 with office expenses of \$700,000 in addition; while in 1911, 45 years after the Americans' last great war, the annual amount paid in pension has risen to \$32,000,000.

* Pensions and Principles of their Evaluations, C.V. Mosby Company, 1919, p.13.

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A passage from the book then stated:

While it would be ungenerous to withhold our admiration for the United States Pension Fund, we must not lose sight of the temptations it afforded to imposition. Such that, in the words of an American general, "It has come to pass that those who were merely on the Rolls for a few days and the malingerers and deserters all march as veterans of the great conflict upon a parity with the noble men who volunteered and fought to the finish".

Nor when we revert to the experiences of our own country in this respect can we flatter ourselves that we were immune from gross abuse. Thus Marshall remarks that "of about 26,000 pensioners that were in Ireland in 1828, 6,000 were, upon examination, found fit for service in the field or in a garrison; and when the pensioners who receive less than one shilling per day in Great Britain were examined early in 1831, from one-third to one-half of the whole number were found fit for military duty. In one station of 1,300 pensioners which were inspected, 600 were returned fit for duty. The most surprising recoveries had taken place. Men who had been discharged as blind were restored to sight, the deaf heard, and the lame ceased to halt".

It is understandable that the Board of Pension Commissioners may have felt fully justified in adopting the viewpoint that the administration of the new Canadian Pension Act should be approached with extreme caution - and that it would be easier to exercise control of its provisions if the requirement to make public any detailed knowledge of the administration could be avoided. Assuming that this was the basis of the Board's approach to the dissemination of information regarding its operations, it can be seen that succeeding Boards and Commissions charged with the administration of this Act, have been faced with a traditional policy of what might be termed "operation privacy".

This may have been acceptable in the early days of pension administration in Canada. It is not acceptable now - and the basis of your Committee's proposal in this regard is that the Commission's open

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should undergo an almost complete reversal which would then see the Commission operating in a policy of what might be termed "full disclosure".

14. Acknowledgements

Your Committee is pleased to report that it has received the full co-operation of the Chairman, the Deputy Chairman, the Commissioners, the Medical Advisory Branch, the Secretariat, the Claims and Review Division, the Veterans' Bureau, the District Offices we have contacted and the staffs of all of them in carrying out its appointed task. Everyone appearing at the hearings evidenced a sincere desire to help. Your Deputy Minister and his staff have also given their full co-operation.

The staff of your Committee worked under the Secretary, Mr. H.C. Chadderton. Their loyalty and devotion to your Committee and to the task at hand are also noted with gratitude and reflect the effective direction and leadership of the Secretary.

15. Veterans Organizations

In acknowledging the assistance afforded in this enquiry, your Committee would wish to pay a special tribute to veterans organizations. The rather considerable knowledge within these organizations concerning pension matters, and the co-operative manner in which this information was made readily available to your Committee were much appreciated. Your Committee was impressed with the importance of the role which these organizations are playing in pension matters, and with the vitality and calibre of their officers and staff who appeared before, or in other manner, assisted, your Committee.

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16. Significance of the Report

Your Committee noted that, for many years following its enquiry, the Report of the Royal Commission on Pensions and Re-establishment of 1922-1924, was referred to by pension administrators, veterans organizations, and others. The Report of The Committee To Investigate into the Administration of the Pension Act in 1932 was also used extensively for reference. In fact, both the 1922 -1924 Royal Commission and the 1932 Special Committee Reports are still authoritative sources of information in regard to the Pension Act.

Having regard to the use made of these previous reports, your Committee has considered the possibility that this current report will also be of use as a reference work. For this reason your Committee has gone to some length to provide the historical basis of those areas of the Act which it inquired into, and to support as fully as possible, its contentions in regard to the legislative provisions.

In further explanation, it was not unusual for your Committee to come across an interpretation or submission, prepared either by those within the Government or persons outside of the Government usually representing veterans interests, in which a conclusion drawn by either the Royal Commission or the Special Committee was cited as having some validity. Your Committee felt that, in view of the possibility that its conclusions and opinions could be cited similarly in future years, the Report should set out fully the background of each question, and basis of the Committee's intentions.

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17. General

The Chairman and members appreciate your confidence in entrusting to them this interesting and important task. Preparing this Report has been a large undertaking and one which your Committee believes to be essential. It is hoped that your Committee's proposals are clear. It has been the Committee's intention to avoid over-simplification. Hence, this is intended as a detailed report which provides full explanation of those questions which your Committee has studied. Its decision were reached only after very considerable and earnest consideration. Some ideas were thoroughly canvassed and discarded and it is the Committee's belief that the recommendations being submitted herewith will achieve a legislative base and an administration for pension for disability and death due to military service which is equitable, efficient, and consistent with the requirements.

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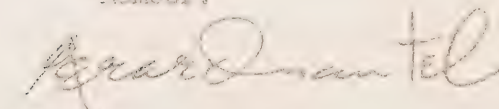
The Chairman and members of your Committee, appointed to enquire into the organization and work of the Canadian Pension Commission in accordance with the terms of Treasury Board Minute TB 645417 of September 8th, 1965, submit to you this Report, together with the separate Minority Report of the Honourable Walter J. Lindal, a member of this Committee and a Supplementary Comment thereon by the majority members, Mr. Justice Mervyn Woods and Col. G.A.M. Nantel.



Mervyn Woods,
Chairman.



W.J. Lindal,
Member.



G.A.M. Nantel,
Member.

Dated at Ottawa, Ontario.

March 22, 1968.

